(2) Supreme Court, U.S.
FILED

No. 00-493 SEP 28 2000

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In The

Supreme Court of the United States

AUSTIN, NICHOLS & CO., INCORPORATED; BACARDI IMPORTS, INC.; JIM BEAM BRANDS CO.; BROWN-FORMAN CORPORATION; DAVID SHERMAN CORPORATION; REMY AMERIQUE, INC.; and SOUTHERN WINE & SPIRITS OF AMERICA, INC., d/b/a Shaw Ross International Importers,

Petitioners,

v.

STATE OF GEORGIA; ZELL MILLER, individually and as Governor of the State of Georgia; MARCUS E. COLLINS, individually and as Georgia State Revenue Commissioner; and CLAUDE L. VICKERS, individually and as Deputy Commissioner of the Administration Division of the Department of Administrative Services and as Director of the Fiscal Division of the Department of Administrative Services and as State Treasurer for the State of Georgia,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES Q1 TO U26

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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Out-of-State Suppliers submit this Memorandum of Law in opposition to Defendants' Motion for Summary Judgment (sometimes "Defendants' Motion") and to Defendants' Brief in Support of Defendants' Motion for Summary Judgment (sometimes "Defendants' Brief").

I. INTRODUCTION

Defendants have moved for summary judgment, apparently as to the entirety of Plaintiffs' actions herein, but they have done so without ever addressing at least two important claims for relief Plaintiffs have asserted. In addition to their other claims, Plaintiffs are also seeking declaratory relief and injunctive relief. Apparently, Defendants do not address these claims – except perhaps indirectly by arguing against Plaintiffs' substantive claims. But Defendants' arguments against the substantive claims clearly do not warrant a grant of summary

judgment. Whatever one thinks of the precedential effect of *Heublein*, that decision certainly cannot control Plaintiffs' Foreign Commerce Clause claims or their Import Export Clause claims, to name but a few. Because of this and because Defendants do challenge the declaratory and injunctive relief claims, the summary judgment motion must be denied, even if for no other reason.

There is a curious provision in the session laws pertaining to the statute under challenge (sometimes called the "1985 Statute"). Between the repeal of the historic double-taxing statute (sometimes the "Pre-1985 Statute") and the enactment of its successor in the double-taxing 1985 Statute under challenge, there existed for, one day, *an equalized statute*. The United States District Court explained why and how this came about:

> In 1985, the Georgia General Assembly engaged in some legislative acrobatics to retain the essential structure of the taxation system, yet insulate it from the Commerce Clause jurisprudence crystalized in *Bacchus*. On March 31, 1985, the Assembly approved an act which equalized the excise tax on imported and domestic alcoholic beverages. However, the equalized tax had no time to become effective, because the next day the Assembly passed another act, the current version of O.C.G.A. § 3-4-60. This statute reimposed the differential tax on imported alcoholic beverages, although it is phrased slightly differently from the pre-1985 statute . . . . The April 1, 1985 Act contained a non-severability clause which provided that the March 31, 1985 version would be reinstated should the later version ever be held invalid or unconstitutional.

Age Int'l, Inc. v. Miller, 830 F. Supp. 1484, 1487-88 (N.D. Ga. 1993) (dismissing "on jurisdictional grounds," *id.* at 1502), *aff'd*, 37 F.3d 637 (11th Cir. 1994). In other words, if the 1985 Statute is ever even so much as declared unconstitutional, the tax will automatically become equalized. Georgia's dalliance with unconstitutional economic protectionism would finally come to an end, without the necessity of any further legislative or executive action and without any revenue loss to the State. This is why the District Court dismissed the case. The District Judge was confident that Plaintiffs would secure declaratory and injunctive relief in this Court. *See id.* at 1501.

II. ARGUMENT AND CITATION OF AUTHORITY

Plaintiffs discuss in detail below the many tests under which the 1985 version of O.C.G.A. § 3-4-60, as currently enacted and enforced (again, hereinafter sometimes the "1985 Statute"), violates the Commerce Clause of the United States Constitution. (Plaintiffs will also show that, although they seek judgment as to the entirety of this action, Defendants have failed even to address – whether factually or legally – many of these tests and Plaintiffs' claims thereunder. As to all such claims unaddressed by Defendants' motion, the motion must naturally be denied.)

Before engaging in that discussion, the Court should note that, as to two of these tests (the purpose and effect of the 1985 Statute), the doctrine of collateral estoppel overrides and bars Defendants' arguments based upon the stare decisis effect of *Heublein* case. Because these issues have been determined adversely to Defendants,

they may not now seek to relitigate the constitutionality of the 1985 Statute under these two Commerce Clause tests.

A. Defendants' Arguments About the Purpose and Effect of the 1985 Statute Are Barred by the Doctrine of Collateral Estoppel

Defendants are barred by the doctrine of collateral estoppel from asserting that either the purpose or the effect of the 1985 Statute complies with the requirements of the Commerce Clause. The doctrine of "collateral estoppel, or estoppel by judgment, bars parties or their privies from relitigating issues which they have actually had adjudicated at a prior time, even though the adjudication may have taken place in a cause of action, or in litigation of a claim different from the one at bar." *Jebco Ventures, Inc. v. City of Smyrna*, 259 Ga. 599, 385 S.E.2d 397, 399 (1989) (citing *Lowe Eng'rs, Inc. v. Royal Indem. Co.*, 164 Ga. App. 255, 258, 297 S.E.2d 41 (1982)). To the extent collateral estoppel should be applied as a matter of federal law, not state law, *see Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62, 104 S. Ct. 1837, 1842-43 (1984), federal collateral estoppel mirrors the collateral estoppel law of Georgia, *see Greenblatt v. Drexel Burnham Lambert, Inc.*, 736 F.2d 1352, 1360 (11th Cir.), *cert. denied*, 470 U.S. 1052 (1985).[1]

As set forth in the present Complaint (No. E-3793), in the case of *James B. Beam Distilling Co. v. State*, Civil Action File No. D-42527 (Fulton Super.), *aff'd*, 259 Ga. 363,

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382 S.E.2d 95 (1989), *rev'd on other grounds*, 501 U.S. ___, 111 S.Ct. 2439 (1991), *see* Complaint (No. E-3793) ¶¶ 132-35 & 140, this Court held that evidence surrounding the enactment of the *1985 Statute* proved that the purpose of the pre-1985 version of O.C.G.A. § 3-4-60 (hereinafter sometimes the "Pre-1985 Statute"), *see* Exhibit X to Complaint (No. E-3793) ¶ 91, was economic protectionism and that the Pre-1985 Statute was therefore violative of the Commerce Clause of the United States Constitution. Complaint (No. E-3793) ¶ 134. The Georgia Supreme Court thereafter held that the purpose and effect of the Pre-1985 Statute were in violation of the Commerce Clause. *Id.* ¶ 135; *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95, 96 (1989) ("The record demonstrates that the *purpose and effect* of the statute was economic protectionism" (emphasis supplied)). When the case came before the United States Supreme Court, that Court went further to hold that the purpose and effect of the Pre-1985 Statute were unconstitutional economic protectionism even in the years immediately preceding the enactment of the 1985 Statute. Complaint (No. E-3793) ¶ 140; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S. Ct. 2439 (1991).

Because these courts held that evidence regarding the enactment of the 1985 Statute proved that even the Pre-1985 Statute had an impermissible purpose and effect, they necessarily decided that the 1985 Statute has an impermissible purpose and effect. Accordingly, Defendants here, who were defendants in *Beam*, are estopped by the judgment in *Beam* from arguing that either the purpose or the effect of the 1985 Statute is valid under the

Commerce Clause, and their motion must therefore be denied.

B. Plaintiffs' Commerce Clause Claims Are Not Barred by the Stare Decisis Effect of the Decision in *Heublein, Inc. v. State*

Plaintiffs assert numerous separate Commerce Clause claims in this action. Defendants have moved for summary judgment as to the entirety of this action on the ground that these claims are assertedly barred by the stare decisis effect of the decision in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987). *E.g.*, Defendants' Brief at 20. Defendants made precisely the same attack upon legal sufficiency in this case when they moved to dismiss. *See* Defendants' Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (dated Sept. 4, 1992); Defendants' Brief in Support of Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (dated Sept. 4, 1992); *see also* Defendants' Reply in Support of Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (service dated Dec. 31, 1992). Judge Hull denied that motion. *See* Order (filed Apr. 7, 1993).

Moreover, as shown below, the Commerce Clause challenge made in *Heublein* was exceedingly narrow, and the decision in *Heublein* rejecting that challenge was likewise exceedingly narrow. Under these circumstances, the *Heublein* decision has no precedential effect on the very different sorts of Commerce Clause claims asserted by Plaintiffs in the present action. Plaintiffs begin with a cursory review of the law establishing the various and

sundry types of Commerce Clause claims that may be brought against a state tax statute.

Rationale for the Dormant Commerce Clause Doctrine. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as *a self-executing limitation* on the power of the State to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240 (1984) (emphasis supplied). The United States Supreme Court has many times iterated that this so-called "dormant commerce clause doctrine" is "not . . . merely a wooden formalism." Instead, the "commerce clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' " *Id.* 467 U.S. at 92, 104 S. Ct. at 2242 (citation omitted); *see also* Complaint (No. E-3793) ¶ 88.

In our federal structure and given the realities of political life, a single state such as Georgia will often respond only to the parochial interests located within that state. Consequently, "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States." *South-Central Timber*, 467 U.S. at 92, 104 S. Ct. at 2242. Further, when a state takes action affecting foreign commerce, this sort of catering to parochial in-state interests may well have a significant effect on persons and operations around the globe. And if, for instance, such foreign interests respond with retaliation, then "the Nation as a whole would suffer." *Japan Line, Ltd. v. County*

of Los Angeles, 441 U.S. 434, 450, 99 S. Ct. 1813, 1822 (1979). Thus, in our federal structure, the decision whether to risk such foreign retaliation, like all other decisions affecting foreign relations, is reserved exclusively to the National Government, not to each individual state.

It follows that, " 'when the [state] regulation is of such a character that its burden falls principally on those without the state, [the state] legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.' " *South-Central Timber*, 467 U.S. at 92, 104 S. Ct. at 2243 (citation omitted). In other words, the legislative and executive branches of a single state respond almost exclusively to in-state interests. And although these branches may take actions that affect out-of-state interests and the National interest in foreign relations, the outside interests are powerless to exert any restraint on in-state politics. It was the absence of such a " 'political check,' " *Washington v. United States*, 460 U.S. 536, 545, 103 S. Ct. 1344, 1350 (1983) (tendential quotation marks), that impelled the courts to develop the dormant Commerce Clause doctrine,[2] a doctrine

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[2] *See also* O. Holmes, Law and the Court in Collected Legal Papers 291, 295-96 (1952 reprint):

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that

sometimes said to "result[] from the Supremacy Clause." *Department of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 749, 98 S. Ct. 1388, 1398-99 (1978).

In their Complaint, Plaintiffs have alleged precisely this sort of disregard of both out-of-state interests and the National interest. *See* Complaint (No. E-3793) ¶¶ 2, 84-127, 133-54. Indeed, Plaintiffs have alleged, not only a mere disregard of such outside interests, but also affirmative efforts, both historical and continuing, on the part of Defendants deliberately and intentionally to discriminate against such interests and to foster and protect in-state interests. *E.g.*, *id.* ¶¶ 84, 100, 137-139, 142-144, 151.

Tests for Commerce Clause Violations. "When a state tax is challenged as violative of the dormant Interstate Commerce Clause," *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8, 106 S. Ct. 2369, 2373 (1986), it "must receive *the* ***careful scrutiny*** of the courts to determine," *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 n.15, 97 S. Ct. 1076, 1084 n.15 (1977); *accord Freeman v. Hewit*, 329 U.S. 249, 253, 67 S. Ct. 274, 277 (1946) ("carefully scrutinized"), whether the state tax transgresses any one of four different tests:

> [1.] Is the tax applied to an activity with a substantial nexus with the taxing State; [2.] Is the tax fairly apportioned; [3.] Does the tax discriminate against interstate commerce; and [4.] Is the

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embodies what the Commerce Clause was meant to end.

> tax fairly related to the services provided by the State.

Wardair Canada, 477 U.S. at 8, 106 S. Ct. at 2373.

When a state tax is challenged as violative of the Foreign Commerce Clause, an even "more extensive constitutional inquiry is required." *Japan Line*, 441 U.S. at 446, 99 S. Ct. at 1820; *accord South-Central Timber*, 104 S. Ct. at 2247 ("more rigorous and searching scrutiny"); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 185, 103 S. Ct. 2933, 2950 (1983) ("additional scrutiny required"). In the case of a Foreign Commerce Clause challenge, all of the same four tests set forth above continue to apply, and then "two additional questions must be asked":

> "*first*, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, *second*, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign government."

Wardair Canada, 477 U.S. at 8, 106 S. Ct. at 2373 (citation omitted, emphasis supplied).

In the present case, Plaintiffs assert numerous claims under each of the various disjunctive tests set forth above – under both 1) the dormant Interstate Commerce Clause and 2) the Foreign Commerce Clause. As shown below, none of these claims is barred by the limited stare decisis effect of the *Heublein* decision.

1. Plaintiffs' Dormant Interstate Commerce Clause Claims

a. Under Test (3): The 1985 Statute Discriminates Against Interstate Commerce

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276, 104 S. Ct. 3049, 3056-58 (1984), the United States Supreme Court reaffirmed that the Twenty-First Amendment did not and does not operate as a pro tanto repeal of the Commerce Clause when the state law at issue has to do with alcohol. Speaking of the discrimination test under the dormant Commerce Clause jurisprudence, the *Bacchus* Court reiterated two alternative (and therefore disjunctive) tests by which a plaintiff may demonstrate that a state tax transgresses the discrimination test:

> A finding that state legislation constitutes "economic protectionism" may be made on the basis of ***either*** discriminatory purpose ***or*** discriminatory effect.

468 U.S. at 270, 104 S. Ct. at 3054-55 (citation omitted, emphasis supplied). In the present case, Plaintiffs assert separate claims under each of the two disjunctive *Bacchus* tests of discrimination. Further, under the discriminatory effect test, a plaintiff may prevail by showing either actual effect or potential effect. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 2623-24 (1984). In the present case, Plaintiffs assert separate claims under each of these two tests of discriminatory effect.

(i) Plaintiffs' Discriminatory Purpose Claims

To begin with, Plaintiffs assert that the 1985 Statute, as enacted and as it has continued to be applied, is invalid under the dormant Interstate Commerce Clause for the reason that the purpose behind both its enactment and its continued application is simple economic protectionism and that the purpose is therefore discriminatory. *E.g.*, Complaint (No. E-3793) ¶¶ 84-151.

(a) The Holding in *Heublein* Had Nothing to Do With the Merits of a Purpose Challenge, Which the Court Said Had Not Ever Been Made

Defendants apparently maintain that the stare decisis effect of the decision in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190 (1987), bars Plaintiffs' discriminatory purpose claims. A careful reading of the *Heublein* decision, however, shows that the decision can have no such effect. In *Heublein*, the Georgia Supreme Court was at pains to note that the taxpayer there had expressly forgone any and all challenge to the statute on the basis of discriminatory purpose. 351 S.E.2d at 195-96. Because the purpose of the statute was so expressly "unchallenged," *id.* at 196, the Supreme Court accepted at face value and without further inquiry the State's stated purpose for the double taxation, "i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors," *id.* In the absence of any challenge to purpose, the Court apparently considered that it had no choice but to affirm,

and the Court thus rendered the following limited holding: "*For this reason* [namely, "the unchallenged purpose"], we cannot say that the trial court erred in sustaining the constitutional validity of the tax under the Twenty-first Amendment rather than striking it down under the Commerce Clause." *Id.* (emphasis supplied).

At most, the *Heublein* decision is a precedent for the very limited proposition that an appellate court "cannot say" that a trial court has "erred in sustaining the constitutional validity of the tax" when the "purpose" behind the enactment of that tax has expressly gone "unchallenged." 351 S.E.2d at 196.[3] At bottom, the holding in *Heublein* was a commentary on the taxpayer's litigation strategy – not on the merits of any underlying purpose challenge, which according to the Court, was never made. In the present case, by contrast, Plaintiffs expressly do challenge purpose. *E.g.*, Complaint (No. E-3793) ¶¶ 125-27. Since Plaintiffs herein do assert claims challenging purpose, there is no contradiction of the *Heublein* decision in allowing those claims to proceed.

(b) Stare Decisis

Indeed, even if the *Heublein* decision were not by its very terms so expressly limited to a holding as to the taxpayer's litigation strategy, the result would be the same under the customary law of stare decisis. Stare "decisis is the doctrine that '. . . when court has once laid down *a principle of law* as applicable to a certain state of

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facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.' " *Norris v. Atlanta & W. Point R.R.*, 254 Ga. 684, 333 S.E.2d 835, 838 (1985) (citation omitted, emphasis supplied). Further, "It *does not work as a bar* but only dictates the conclusion of law which will be made upon a given set of facts." *Id.* (emphasis supplied).

(1) The *Heublein* Decision Stated No Principle of Law and Issued No Specific Ruling on the Merits of a Purpose Challenge That Was Never Made

To begin with, to qualify for stare decisis effect, the prior decision must state a "principle of law." *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25, 30 (1954). Mere "inferences from prior cases" do not qualify and are therefore not binding. *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316, 318 (1978). Unless there is "reasoned consideration" resulting in a "specific ruling" on a certain legal issue, the prior decision has no stare decisis effect on that issue. *Id.*; *Gordy Tire Co. v. Dayton Rubber Co.*, 216 Ga. 83, 114 S.E.2d 529, 534 (1960); *see also Griffin v. Hardware Mut. Ins. Co.*, 212 Ga. 130, 91 S.E.2d 10, 11 (1956). The *Heublein* decision, by contrast, stated no principle of law applicable to and issued no specific ruling against a purpose challenge under the dormant Interstate Commerce Clause to the 1985 Statute. As noted, the holding of that decision went to a much different and more limited proposition concerning the taxpayer's litigation strategy.

(2) According to the Court, No Purpose Challenge Was Even Raised in *Heublein*

Stated another way, to qualify for stare decisis effect, the "question [must have been] raised in the [prior] case" so that the earlier court could "consider" that question and "rule thereon." *Gordy Tire*, 114 S.E.2d at 533-34. Further, a question will be considered "settled" for stare decisis purposes "only after the opposing positions have been tested by the adversary process." *Houston General*, 246 S.E.2d at 318. " ' "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." ' " *Gordy Tire*, 114 S.E.2d at 534 (citation omitted); *see also Albany Fed. Sav. & Loan Ass'n v. Henderson*, 198 Ga. 116, 31 S.E.2d 20, 32 (1944); *see Rivers v. Brown*, 200 Ga. 49, 36 S.E.2d 429, 431 (1945). In the *Heublein* case, by contrast, the Court expressly observed that the taxpayer had not raised the purpose question and that purpose was therefore "unchallenged" both at the trial level and in the case as it came before the Court. 351 S.E.2d at 196. It would be exceedingly unfair to preclude all later litigants from asserting a claim merely because an earlier litigant in some other case did not raise the point.

At least three further circumstances show that Defendants may not use the *Heublein* decision to preclude litigation of Plaintiffs' claims challenging purpose.

(3) The United States Supreme Court and Georgia Supreme Court Decisions in *Beam* Operate as Intervening Decisions

First, as already recounted, after the *Heublein* decision had been rendered, in the discovery phase of a separate action challenging the Pre-1985 Statute, the State of Georgia produced documents concerning the legislative history of the 1985 statute that had not been produced or considered by the court in the earlier and unsuccessful *Heublein* court challenge to the 1985 statute. Relying upon the newly disclosed evidence concerning the enactment of the import approach 1985 statute, the Fulton County Superior Court found and held that the purpose of the Pre-1985 Statute was economic protectionism and that the Pre-1985 Statute was therefore in violation of the Commerce Clause.

In other words, the evidence concerning the enactment *of the **1985 Statute*** was so compelling that the Fulton Superior Court used that evidence to invalidate the last three years of operation of yet another statute, *namely, the **Pre-1985 Statute**, which **had preexisted** the 1985 Statute*. On appeal, the Georgia Supreme Court in *James B. Beam Distilling Co. v. State of Georgia*, 259 Ga. 363, 382 S.E.2d 95, 96 (1989), *affirmed that both **the purpose*** and the effect of the Pre-1985 Statute were simple economic protectionism and that the Pre-1985 Statute was invalid under the Commerce Clause. Thereafter, when the case came before the United States Supreme Court, that Court went further to hold that the purpose and the effect of the Pre-1985 Statute were economic protectionism even in the

years immediately preceding the enactment of the 1985 Statute. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991).

The decisions of the Georgia Supreme Court and the United States Supreme Court, rendered in 1989 and 1991 respectively and therefore after the 1987 decision in *Heublein*, should operate as intervening decisions tending to vitiate any preclusive stare decisis effect, to the extent there is any, of the *Heublein* decision. *See generally Limbach*, 466 U.S. at 362, 104 S. Ct. at 1843; *Mason and Dixon Lines, Inc. v. Odom*, 193 Ga. 471, 18 S.E.2d 841, 844 (1942); *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250, 252 (1972); *Hambrick v. Nova*, 112 Ga. App. 258, 144 S.E.2d 922, 923 (1965). Afterall, in *Beam*, the Georgia Supreme Court (as well as the United States Supreme Court) has now expressly considered the evidence concerning the enactment of the 1985 Statute and has held that this evidence supports a finding of economic protectionism and discriminatory purpose *even as to the last three years of operation of the Pre-1985 Statute*, a statute enacted long before the events demonstrated by the evidence surrounding the enactment of the 1985 Statute.

(4) The Evidence and Facts of the Present Case Are Different From Those of *Heublein*

Second, the newly disclosed evidence and facts in the *Beam* action concerning the enactment of the 1985 Statute were neither "produced [n]or considered by the court in the earlier and unsuccessful *Heublein* court challenge to

the 1985 statute." Complaint (No. E-3793) ¶ 133. As noted, the *Heublein* decision can have no preclusive stare decisis effect as to the legal import of evidence and facts never presented or considered by the Georgia Supreme Court in that case. *See Houston General*, 246 S.E.2d at 318; *Gordy Tire*, 114 S.E.2d at 533-34; *Albany Fed. Sav. & Loan Ass'n*, 31 S.E.2d at 32; *see also Rivers*, 36 S.E.2d at 431.

Further, as noted, a prior decision may apply as stare decisis only " 'where the facts are substantially the same.' " *Norris*, 333 S.E.2d at 838 (citation omitted); *see also Wright v. Lake*, 75 Ga. 219, 221 (1885) ("The argument of a judge, pronouncing an opinion upon a different state of facts, however much the argument may appear to fit the facts of the case being considered, is not binding as a decision"); *Peppers v. Travelers' Ins. Co.*, 48 Ga. App. 595, 173 S.E. 177, 178 (1934) (when "the material facts of [the later] case are identical with those" of the prior case, the prior case is "controll[ing]"). In the present case, the newly disclosed evidence and facts show that this case and the earlier *Heublein* case are factually different: thus, the *Heublein* decision could not have stare decisis effect for the present case even if the *Heublein* decision did have a pertinent holding, which it does not.[4]

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[4] Actually, the "material facts" for the purposes of the holding in *Heublein* had nothing to do with the merits of a purpose challenge never made. Instead, the material fact was that the taxpayer there had failed to make such a challenge. Here, by contrast, Plaintiffs expressly do make such a challenge, and the material facts of the present case are therefore clearly different from the material facts of the *Heublein* case.

(5) The Present Action Asserts Claims Arising After *Heublein* and Presenting New Issues

Third, Plaintiffs herein assert discriminatory purpose claims entirely different from the purpose claim that might have been asserted (but was not asserted) in the *Heublein* litigation. As noted, Plaintiffs have asserted that the 1985 Statute is a continuing violation of United States law. *E.g.*, Complaint (No. E-3793) ¶ 84. Further, Plaintiffs' discriminatory purpose claims concern later years of operation under the 1985 Statute. Of course, the *Heublein* decision could not possibly have any stare decisis effect precluding *claims that **did not even exist*** at the time *Heublein* was rendered in 1987. Finally, wholly apart from the evidence first disclosed after the *Heublein* case, Plaintiffs intend to prove their discriminatory purpose claims by also using evidence concerning events of more recent vintage. *E.g.*, *id.* ¶¶ 143-54. The *Heublein* decision could not possibly have any stare decisis effect tending to preclude a discriminatory purpose claim based on events and violations occurring well after the *Heublein* decision was rendered.

For all these reasons, the *Heublein* decision is not and could not be stare decisis of Plaintiffs' discriminatory purpose claims herein.

(ii) Plaintiffs' Potential Discriminatory Effect Claims and

(iii) Plaintiffs' Actual Discriminatory Effect Claims

Plaintiffs also assert separate claims under the dormant Interstate Commerce Clause challenging the 1985 Statute as economically protectionist in effect and as therefore having a prohibited discriminatory effect. Plaintiffs assert that the 1985 Statute has a potential discriminatory effect. Alternatively, Plaintiffs assert that the 1985 Statute has an actual discriminatory effect. Again, Defendants have moved to dismiss these claims as well apparently on the ground that the *Heublein* decision is assertedly a precedent against such claims.

The *Heublein* decision cannot be read to bar a discriminatory effect claim; the *Heublein* Court nowhere even addressed the effect of the 1985 Statute and certainly did not address whether its effect, either potential or actual, was discriminatory. Instead, as noted, the *Heublein* decision was solely concerned with the fact that the "purpose" of the 1985 Statute had gone "unchallenged." 351 S.E.2d at 196. Again, under this circumstance, the *Heublein* Court rendered the following limited holding: "*For this reason* [namely, the fact that the "purpose of the import tax" was "unchallenged"], we cannot say that the trial court erred in sustaining the constitutional validity of the tax under the Twenty-first Amendment rather than striking it down under the Commerce Clause." *Id.* (emphasis supplied). Nowhere in this holding or any of the Court's discussion otherwise was the effect of the 1985 Statute ever even addressed. Obviously, in the total

absence of even any mention of the effect of the 1985 Statute, there was no holding about whether the effect of the 1985 Statute was in fact discriminatory.[5]

Again, to qualify for stare decisis effect, the prior decision must state a principle of law, a specific ruling on the legal issue. *See Norris*, 333 S.E.2d at 838; *Houston General*, 246 S.E.2d at 318; *Gordy Tire*, 114 S.E.2d at 534; *Griffin*, 91 S.E.2d at 11; *see also supra* Section II.B.1.a.(i)(b). Clearly, in the absence of any mention whatsoever, there was no principle of law concerning and no specific ruling against a discriminatory effect challenge to the 1985 Statute under the dormant Interstate Commerce Clause.

In any event, even if the *Heublein* decision did have any stare decisis effect for a discriminatory effect claim, the same three circumstances outlined above would serve to vitiate any such stare decisis effect.

First, as noted, the new evidence and facts first disclosed, not in the *Heublein* litigation, but only later in the *Beam* litigation, concerning the enactment of the 1985 Statute caused the Fulton Superior Court in *Beam* to find and to hold that the Pre-1985 Statute constitutes "economic protectionism (that is, to benefit local business and local industry)." Complaint (No. E-3793) ¶ 134. In other words, as already noted, the evidence concerning the

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[5] Again, the holding in and the precedent created by the *Heublein* decision go to a quite different matter: namely, that an appellate court "cannot say" that a trial court has "erred in sustaining the constitutional validity of the tax" when the "purpose" has expressly gone "unchallenged" [at both the trial level and the appellate level]. 351 S.E.2d at 196. *See also supra* Section II.B.1.a.(i)(a).

enactment of the 1985 Statute was so compelling that this Court used that evidence concerning events largely in 1985 to invalidate approximately the last three years of operation of a predecessor statute, namely the Pre-1985 Statute, which had been in fact enacted many years before 1985. Further, on appeal, the Georgia Supreme Court in *Beam* affirmed that both the purpose ***and the effect*** of the Pre-1985 Statute were simple economic protectionism and that the Pre-1985 Statute were invalid under the Commerce Clause of the United States Constitution. *Id.* Thereafter, the United States Supreme Court went further to hold that the purpose and the effect of the Pre-1985 Statute were economic protectionism even in the years immediately preceding the enactment of the 1985 Statute. *Id.* Thus, even if the *Heublein* decision could somehow be said to be a precedent against Plaintiffs' discriminatory effect claims, the later decisions in *Beam* find and hold that the new evidence and facts concerning the enactment of the 1985 Statute show economic protectionism and therefore show discriminatory effect. These later decisions in *Beam* must therefore be seen to be intervening decisions vitiating any stare decisis effect of the *Heublein* decision against Plaintiffs' discriminatory effect claims. *See also supra* Section II.B.1.a.(i)(b)(3).

Second, even if the *Heublein* decision could be said to be a precedent against their discriminatory effect claims, Plaintiffs should be permitted to present newly disclosed evidence and facts concerning discriminatory effect notwithstanding this alleged adverse precedent in the *Heublein* decision. Afterall, the newly disclosed evidence and facts ***directly concern the 1985 Statute*** and yet were so powerful that they became the basis for invalidating *the*

*predecessor in the **Pre-1985 Statute***. This evidence and these facts were never disclosed during the *Heublein* litigation, but rather only later (some in the *Beam* litigation and some in the instant case), and therefore could not be and were in fact neither produced nor considered by the courts in the *Heublein* litigation. *See also supra* Section II.B.1.a.(i)(b)(4).

Third and finally, even if the *Heublein* decision could somehow be said to have adjudicated a discriminatory effect claim, Plaintiffs herein assert discriminatory effect claims totally different from any such claim in the *Heublein* litigation. Plaintiffs herein assert a continuing violation of the dormant Interstate Commerce Clause and level their discriminatory effect claims against later years of operation under the 1985 Statute. *E.g.*, Complaint (No. 3793) ¶ 84; *see also* Exhibits C-Q & S-V to Complaint (No. 3793). Further, Plaintiffs expect to prove their discriminatory effect claims with evidence concerning more recent events. *E.g.*, Complaint (No. E-3793) ¶¶ 143-54. These events occurred well after the Georgia Supreme Court's ***1987*** decision in *Heublein*, and that decision therefore could not possibly have adjudicated a claim concerning events in the years after 1987. *See also supra* Section II.B.1.a.(i)(b)(5).

For all these reasons, the *Heublein* decision is not and could not possibly be a precedent precluding litigation of Plaintiffs' (potential and actual) discriminatory effect claims herein.

b. Under Test (1): The 1985 Tax Statute Has an Insufficient Nexus

Plaintiffs also assert dormant Interstate Commerce Clause claims based on lack of nexus. As noted, a state tax "must receive the careful scrutiny of the courts" to determine whether it has "a sufficient nexus with the State." *Complete Auto*, 430 U.S. at 277-78, 288 n.15, 97 S. Ct. at 1078, 1084 n.15. The nexus test under the dormant Interstate Commerce Clause is sometimes said to derive from the Due Process principle " 'that the power of a state, even its power of taxation, in respect to property, is limited to such as is ***within*** its jurisdiction.' " *Miller Bros, Co. v. Maryland*, 347 U.S. 340, 342, 74 S. Ct. 535, 537 (1954) (citation omitted, emphasis supplied). "[D]ue process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* 347 U.S. at 344-45, 74 S. Ct. at 539.[6]

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[6] *Accord Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464, 79 S. Ct. 357, 366 (1959) (" 'nexus between such a tax and *transactions **within*** a state for which the tax is an exaction' " (citation omitted, emphasis supplied)); *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537, 71 S. Ct. 377, 380 (1951) ("some local incident [must] occur[] sufficient to bring the transaction within its taxing power"); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439, 59 S. Ct. 325, 327 (1939) (not to tax "activities in such commerce which extend beyond the territorial limits of the taxing state"); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256, 58 S. Ct. 546, 549 (1938) (tax to be limited to "the commerce carried *on **within*** the taxing state" and not to "extend[] to the commerce carried on *without the state boundaries*" (emphasis supplied)); *Connecticut Gen. Life Ins. v. Johnson*, 303 U.S. 77, 80-81, 58 S. Ct. 436, 438

In the present case, the tax imposed on distilled spirits and alcohol under the 1985 Statute comes in two parts. In Subpart (1), the 1985 Statute imposes a universal tax, applicable to all distilled spirit and alcohol products (hereinafter sometimes "liquor products"), whether in-state products or out-of-state products or foreign products. The tax here is imposed upon "the first sale, use, or final delivery within this state." O.C.G.A. § 3-4-60(1). In Subpart (2), the 1985 Statute imposes double taxation solely on out-of-state liquor products and foreign liquor products. Here in Subpart (2), the 1985 Statute recalls the very same language; thus, the double tax in Subpart (2) is "imposed upon the importation for *use, consumption, or final delivery* into this state." *Id.* § 3-4-60(2) (emphasis supplied).

In the one case, the nexus is "first sale, use, or final delivery." *Id.* § 3-4-60(1). In the other case, the language is importation for "use, consumption, or final delivery." *Id.* § 3-4-60(2). Plaintiffs do not challenge the sufficiency of the *first sale, use, or final delivery* nexus under Subpart (1). Plaintiffs do, however, assert that Subpart (1) exhausts this nexus. Therefore, the nexus for the special double tax reserved solely for out-of-state and foreign liquor products must lie elsewhere.

Indeed, the 1985 Statute provides a couple different indications of the nexus for the special double tax in Subpart (2). The special double tax is said to be imposed upon the act of "importation." *Id.* § 3-4-60(2). Of course,

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(1938 ("But the due process clause denies to the state power to tax . . . the corporation's property and *activities elsewhere*" (emphasis supplied)).

such an importation – the mere instantaneous crossing of the Georgia border before the *first sale, use, or final delivery* nexus of the tax in Subpart (1) becomes operative – is obviously necessitated by the fact that out-of-state and foreign liquor products are by definition *manufactured* elsewhere.[7] Indeed, the 1985 Statute makes this explicit when it goes on to create an express exemption for liquor products manufactured within the State of Georgia. Thus, in Subpart (3), the 1985 Statute makes clear that "All alcohol spirits ***manufactured*** within this state for sale within this state shall be made from Georgia grown products." *Id.* § 3-4-60(3) (emphasis supplied).

In other words, the exemption in Subpart (3) makes explicit what is already inherent in the structure of the first two Subparts of the 1985 Statute: Liquor products "manufactured" within the State of Georgia (from Georgia grown products) are exempt from the special double tax in Subpart (2), and such tax is imposed exclusively upon liquor products *either 1) "manufactured" elsewhere within the United States or 2) "manufactured" overseas* – products that, by virtue of their out-of-state or overseas manufacture, must thereafter be "import[ed]" into the State of Georgia. *Id.* § 3-4-60(2) & (3) (emphasis supplied).

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[7] *See also* First Transcript at 4: "*The import tax obviously would not apply to* ***domestically produced*** products, and this would gain the additional $.50 and yet maintain the position that our distilleries in the State of Georgia have on a $.50 break. Now this is important to many of us, all over the state." (Emphasis supplied). *See infra* note 20 regarding these transcripts.

In these dormant Interstate Commerce Clause claims, Plaintiffs assert that there is an insufficient nexus with the State of Georgia to sustain the special double tax imposed exclusively on out-of-state and foreign liquor products under Subpart (2) of the 1985 Statute. Specifically, Plaintiffs assert that, when as here the *first sale, use, or final delivery* nexus with the State of Georgia already serves as the basis for a tax under Subpart (1), the remaining nexus under Subpart (2) – namely, that out-of-state and foreign products are "manufactured" elsewhere and therefore of necessity must be "import[ed]" into the State of Georgia, O.C.G.A. § 3-4-60(2) & (3) – is neither proper nor sufficient to sustain the special double tax in Subpart (2).

If, judging by the Subpart (3) exemption based on place of "manufacture[]," the special double tax is one on manufacture, then the nexus is clearly improper as an attempt to tax out-of-state activity. *See supra* note 6. Obviously, the state that comprises the place of manufacture, and not Georgia, is the taxing jurisdiction with the proper nexus to tax that manufacturing activity. *See International Harvester Co. v. Evatt*, 329 U.S. 416, 420, 67 S. Ct. 444, 446 (1947); *Freeman*, 329 U.S. at 255, 67 S. Ct. at 278; *see also Michigan-Wis. Pipe Line Co. v. Calvert*, 347 U.S. 157, 168, 74 S. Ct. 396, 402 (1954). On the other hand, if the exemption based on place of manufacture is simply disregarded and the special double tax is seen as one solely on the act of "importation," then the nexus is nevertheless insufficient and improper.

To begin with, any such *importation* nexus is exceedingly narrow. On one hand, before the goods reach the Georgia border, there is clearly no proper nexus for the same reasons there is no proper nexus to tax out-of-state and overseas manufacture. On the other hand, once the goods pass over the Georgia border, the *first sale, use, or final delivery* nexus supporting the universal tax in Subpart (1) becomes operative. *See Miller Bros.*, 347 U.S. at 344, 74 S. Ct. at 538.

Further, to tax specially and uniquely the mere instantaneous and interstate act of transporting a product across a border from one state to another state would be to tax "the very process of interstate commerce." *Freeman*, 329 U.S. at 253, 67 S. Ct. at 277; *see also McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S. Ct. 1023, 1026 (1944) (tax on in-state sale or in-state use permissible, but "a tax on an *interstate sale* . . . involves an assumption of power by a State which the Commerce Clause was meant to end" (emphasis supplied)). And the courts have so held. *See Norton*, 340 U.S. at 539, 71 S. Ct. at 381 ("shipp[ing]" from one state to customers in another state was "so clearly interstate in character" as to be "not subject to . . . tax"); *Michigan-Wis. Pipe Line Co.*, 347 U.S. at 170, 74 S. Ct. at 403 (as a good travels interstate, states may not each separately tax as a "first taking" the exportation of the good outside the state and as a "first unloading" the importation of the good into the state).[8]

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[8] Elsewhere in their Brief, in an attempt to evade Plaintiffs' Import Export Claims, Defendants wholly ignore the statutory references to place of "manufacture[]" and "importation" in order to suggest that the tax in Subpart (2) is really only a tax on

Defendants move for summary judgment as to Plaintiffs' nexus claims apparently on the ground that the *Heublein* decision is assertedly a precedent against such claims. On the contrary, the *Heublein* decision had absolutely nothing to do with a nexus claim under the dormant Interstate Commerce Clause and therefore could not possibly establish an adverse precedent for such claims. Accordingly, to the extent Defendants move against Plaintiffs' nexus claims under the dormant Interstate Commerce Clause, Defendants' motion must be denied.

c. Under Test (2): The 1985 Tax Is Unapportioned, Exposing Plaintiffs to Multiple Taxation

As noted, a state tax challenged under the dormant Interstate Commerce Clause "must receive the careful scrutiny of the courts" to determine whether "the tax is unfairly apportioned." *Complete Auto*, 430 U.S. at 378, 288 n.15, 97 S. Ct. at 1078, 1084 n.15. As part of this scrutiny,

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in-state use, consumption, or final delivery. *See* Defendants' Brief at 43-45.

Even if this extreme construction could be placed upon the 1985 Statute, the Commerce Clause violation remains. Of course, as noted, the universal tax in Subpart (1) already employs and exhausts the *first sale, use, or final delivery* nexus. Thus, in order to make Defendants' already extreme construction work, the 1985 Statute would have to be contorted still further by reading Subpart (1) to be a tax on "first sale" alone and Subparts (1) and (2), *in some sort of combination*, to be a special double tax on "use, or final delivery." Such a construction, however implausible, would then itself directly contravene "the strict rule of equality" requiring a use tax to be no more than a sales tax. *Halliburton Oil Well Cementing Co. v. Reily*, 273 U.S. 64, 73, 83 S. Ct. 1201, 1206 (1963).

the courts have examined whether there was "any question . . . regarding apportionment *or potential multiple taxation.*" *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 101 S. Ct. 2946, 2953 (1981) (emphasis supplied); *see also Michigan-Wis. Pipe Line Co.*, 347 U.S. at 166, 74 S. Ct. at 400-01; *Gwin, White & Prince*, 305 U.S. at 439-40, 59 S. Ct. at 327-28; *Western Live Stock*, 303 U.S. at 255-56, 58 S. Ct. at 548-49. A plaintiff asserting such a claim may show actual multiple taxation. Alternatively, the plaintiff may also prevail by showing the potential for duplicative taxation. *See Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444, 100 S. Ct. 1223, 1235 (1980); *see also Armco Inc.*, 467 U.S. at 644, 104 S. Ct. at 2623-24; *Freeman*, 329 U.S. at 256-57, 67 S. Ct. at 278-79. In the present case, Plaintiffs assert both kinds of multiple taxation claims.

(i) Plaintiffs' Potential Multiple Taxation Claims

As demonstrated above, the tax imposed under Subpart (2) of the 1985 Statute is a tax reserved solely for liquor products "manufactured" outside the State of Georgia, and these products, because of their place of manufacture, must thereafter be "import[ed]" into the State of Georgia. O.C.G.A. § 3-4-60(2) & (3). All that distinguishes these liquor products from the liquor products exempt from the special double tax in Subpart (2) *is the place of "manufacture[ ]"* (again with proviso that liquor products "manufactured" within the State of Georgia must also be "made from Georgia grown products"). *Id.* § 3-4-60(3) (emphasis supplied).

Clearly, a tax on the manufacture of out-of-state liquor products such as those products represented by

Plaintiffs exposes Plaintiffs to a serious risk of multiple taxation. Afterall, under conventional nexus analysis, it is hardly within the province of a taxing jurisdiction such as Georgia to impose a tax upon the manufacture of goods when that manufacture may have taken place in any one of many various locales across the Nation, but never within the State of Georgia itself. In other words, the usual expectation would be that any one of these other taxing jurisdictions comprising the actual place of manufacture would have a much stronger claim of nexus under which to impose a tax on manufacture. *See International Harvester*, 329 U.S. at 420, 67 S. Ct. at 446; *Freeman*, 329 U.S. at 255, 67 S. Ct. at 276; *see also Michigan-Wis. Pipe Line Co.*, 347 U.S. at 168, 74 S. Ct. at 402. If Georgia is allowed to persist in imposing its own tax on goods manufactured outside the State of Georgia, then Plaintiffs are thereby exposed to a serious risk of multiple taxation – first, in the taxing jurisdiction comprising the place of manufacture and, second, in the State of Georgia.

Defendants have moved to dismiss Plaintiffs' potential multiple taxation claims apparently on the ground that the decision in *Heublein* establishes a precedent adverse to any such claim. A quick perusal of the *Heublein* decision shows, however, that the *Heublein* decision had nothing whatsoever to do with potential multiple taxation and therefore could not possibly establish any precedent concerning Plaintiffs' potential multiple taxation claims herein. Accordingly, to the extent Defendants move against Plaintiffs' potential multiple taxation claims under the dormant Interstate Commerce Clause, Defendants' motion must be denied.

(ii) Plaintiffs' Actual Multiple Taxation Claims

Further, under the dormant Interstate Commerce Clause, Plaintiffs also assert claims of actual multiple taxation. In other words, Plaintiffs assert and are entitled to prove that Georgia's special double tax under Subpart (2) of the 1985 Statute on liquor products "manufactured" outside the State of Georgia does in fact duplicate taxes in other jurisdictions implicating the manufacture of these same liquor products and thus exposing these out-of-state liquor products and Plaintiffs to an actual burden of multiple taxation.

Defendants have moved to dismiss Plaintiffs' actual multiple taxation claims apparently on the ground that the *Heublein* decision assertedly constitutes a precedent adverse to such claims. Again, however, a quick perusal of the *Heublein* decision demonstrates conclusively that the *Heublein* decision had absolutely nothing whatsoever to do with a claim of actual multiple taxation and therefore could not possibly constitute a precedent adverse to such a claim. Accordingly, to the extent Defendants move against Plaintiffs' actual multiple taxation claims under the dormant Interstate Commerce Clause, Defendants' motion must be denied.

d. Under Test (4): The 1985 Tax Is Not Related to Services Provided by Georgia

As noted, a state tax "must receive the careful scrutiny of the courts" to determine whether "it is unrelated to services provided by the State." *Complete Auto*, 430 U.S. at 278, 288 n.15, 97 S. Ct. at 1078, 1084 n.15. Defendants

have moved for summary judgment as to Plaintiffs' tax-to-cost relation claims under the dormant Interstate Commerce Clause apparently on the ground that the *Heublein* decision is assertedly a precedent adverse to such a claim. Once again, the *Heublein* decision has nothing whatsoever to do with such a claim and therefore could not possibly establish a precedent contrary to such a claim. Accordingly, to the extent Defendants move against Plaintiffs' tax-to-cost relation claims under the dormant Interstate Commerce Clause, Defendants' motion must be denied.

2. Plaintiffs' Dormant Foreign Commerce Clause Claims

Insofar as the 1985 Statute implicates foreign commerce, Plaintiffs also assert claims (in some instances similar to the above-described claims asserted under the dormant Interstate Commerce Clause) under the "additional scrutiny required" by the dormant Foreign Commerce Clause. *Container Corp.*, 463 U.S. at 185, 103 S. Ct. at 2950; *see also South-Central Timber*, 104 S. Ct. at 2247 ("more rigorous and searching scrutiny").

a. Under Test (3): The 1985 Statute Discriminates Against Foreign Commerce

(i) Plaintiffs' Discriminatory Purpose Claims

Plaintiffs assert that the 1985 Statute, as enacted and as it has continued to be applied, is invalid under the Foreign Commerce Clause for the reason that the purpose behind both its enactment and its continued application is to discriminate against foreign commerce. Defendants

move for summary judgment as to these claims apparently on the ground that the *Heublein* decision assertedly constitutes a precedent against such a claim. The Court in *Heublein* did not, however, even consider the Foreign Commerce Clause, and consequently, the decision rendered in that case could not possibly constitute a precedent against claims asserted under the Foreign Commerce Clause. *See also supra* Section II.B.1.a.(i). Accordingly, to the extent Defendants move against Plaintiffs' discriminatory purpose claims under the Foreign Commerce Clause, Defendants' motion must be denied.

(ii) Plaintiffs' Potential Discriminatory Effect Claims and

(iii) Plaintiffs' Actual Discriminatory Effect Claims

Plaintiffs also assert separate claims under the Foreign Commerce Clause challenging the 1985 Statute as having a prohibited discriminatory effect on foreign commerce. Plaintiffs assert that the 1985 Statute has a potential discriminatory effect. Additionally and alternatively, Plaintiffs assert that the 1985 Statute has an actual discriminatory effect.

Here, too, Defendants' ground for summary judgment on these claims (the assertedly adverse precedent in *Heublein*) is simply way off the mark. Again, the *Heublein* decision did not concern the Foreign Commerce Clause and, therefore, could not possibly constitute a precedent against claims asserted under that Clause. *See also supra* Sections II.B.1.a.(ii) & II.B.1.a.(iii). Accordingly, to the extent Defendants move against Plaintiffs' discriminatory

effect claims – both potential and actual effect claims – under the Foreign Commerce Clause, Defendants' motion must be denied.

b. Under Test (1): The 1985 Tax Statute Has an Insufficient Nexus

Plaintiffs also assert Foreign Commerce Clause claims based on lack of nexus. Defendants' apparent assertion notwithstanding, the *Heublein* decision did not concern any Foreign Commerce Clause claim and, therefore, could not possibly constitute a precedent against such a claim. *See also supra* Section II.B.1.b. Accordingly, to the extent Defendants move against Plaintiffs' nexus claims under the Foreign Commerce Clause, Defendants' motion must be denied.

c. Under Test (2): The 1985 Tax Is Unapportioned, Exposing Plaintiffs to Multiple Taxation and

d. Under Test (5): The 1985 Tax Exposes Plaintiffs to Multiple International Taxation

(i) Plaintiffs' Potential Multiple Taxation Claims and

(ii) Plaintiffs' Actual Multiple Taxation Claims

Plaintiffs also assert Foreign Commerce Clause claims based on multiple taxation. As already demonstrated, a plaintiff asserting such a claim may show actual multiple taxation. Alternatively, the plaintiff may also prevail by showing the potential for duplicative taxation. *See supra* Section II.B.1.c. To the extent the 1985 Statute implicates foreign commerce, Plaintiffs herein reassert

their claims of potential and actual multiple taxation under the Foreign Commerce Clause for the "additional scrutiny required" by that Clause. *Container Corp.*, 463 U.S. at 185, 103 S. Ct. at 2950.

Further, in a similar vein, Plaintiffs assert that the 1985 Statute violates the Foreign Commerce Clause because it exposes Plaintiffs to "international multiple taxation." *Wardair Canada*, 477 U.S. at 8, 106 S. Ct. at 2373. A plaintiff asserting such a claim need only show the potential for international multiple taxation, *i.e.*, "a *substantial risk* of international multiple taxation." *Id.* (emphasis supplied). Alternatively, the plaintiff may also prevail by showing actual international multiple taxation. In the present case, Plaintiffs assert both kinds of international multiple taxation claims.

Here, too, Defendants move for summary judgment apparently on the ground that the *Heublein* decision assertedly constitutes a precedent adverse to these kinds of claims. Again, however, the *Heublein* decision did not concern the Foreign Commerce Clause and, therefore, could not possibly constitute a precedent against claims asserted under that Clause. *See also supra* Sections II.B.1.c.(i) & II.B.1.c.(ii). Accordingly, to the extent Defendants move against Plaintiffs' multiple taxation claims – both potential and actual multiple taxation claims – under the dormant Foreign Commerce Clause, Defendants' motion must be denied.

e. Under Test (4): The 1985 Tax Is Not Related to Services Provided by Georgia

Plaintiffs also assert dormant Foreign Commerce Clause claims based on the lack of relation to the allegedly increased cost of regulating foreign liquor products. Defendants' apparent assertion notwithstanding, the *Heublein* decision did not concern any Foreign Commerce Clause claim and, therefore, could not possibly constitute a precedent against such a claim. *See also supra* Section II.B.1.d. Accordingly, to the extent Defendants move against Plaintiffs' tax-to-cost relation claims under the Foreign Commerce Clause, Defendants' motion must be denied.

f. Under Test (6): The 1985 Tax Prevents the National Government From Speaking With One Voice

Insofar as it implicates foreign commerce, the special double tax in the 1985 Statute reserved for liquor products "manufactured" abroad and thereafter necessarily "import[ed]" into the State of Georgia, O.C.G.A. § 3-4-60, is indistinguishable from a tariff. It should long ago have been clear to all concerned that the State of Georgia has absolutely no competence or jurisdiction to establish a tariff or a tariff-like measure (sometimes called a non-tariff barrier) vis-á-vis foreign goods. In the emphatic language of the United States Supreme Court, Georgia "may not tell this Nation . . . how to run [its] foreign polic[y]." *Japan Line*, 441 U.S. at 455, 99 S. Ct. at 1825. Georgia, along with all the other states, long ago ceded this power entirely to the National Government so that it

may exercise it on behalf of the entire Nation. *Washington Stevedoring*, 435 U.S. at 760, 98 S. Ct. at 1404; *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285, 96 S. Ct. 535, 540 (1976); *see South-Central Timber*, 104 S. Ct. at 2243 n.7.

Here, too, Defendants move for summary judgment apparently on the ground that the *Heublein* decision assertedly constitutes a precedent adverse to this kind of claim. The Court in *Heublein* did not, however, even consider the Foreign Commerce Clause, and consequently, the decision rendered in that case could not possibly constitute a precedent against claims asserted under the Foreign Commerce Clause. Here, too, Defendants' motion must be denied.

C. Plaintiffs' Federal Equal Protection Claims Are Not Barred by the Stare Decisis Effect of the Decision in *Heublein, Inc. v. State*

Plaintiffs also assert several Federal Equal Protection claims in this action. Here, too, Defendants have moved to dismiss on the ground that these claims are assertedly barred by the stare decisis effect of the *Heublein* decision. Plaintiffs will briefly describe the nature of their Federal Equal Protection claims herein and thereafter show how the *Heublein* decision could not possibly be a precedent against these claims.

Generally speaking, a Federal Equal Protection claim may be shown in either of two different ways:

> In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation

> have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote that purpose?

Western and S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 688, 101 S. Ct. 2070, 2083 (1981). In the present case, Plaintiffs assert both kinds of Federal Equal Protection claims.

To begin with, Plaintiffs assert that the 1985 Statute, as enacted and as it has continued to be applied, is invalid under the Federal Equal Protection Clause for the reason that the purpose behind both its enactment and its continued application is simple economic protectionism and that the purpose is therefore discriminatory. The case law establishes that "A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . *if the discrimination is founded upon a reasonable distinction, or difference in state policy,' **not in conflict with the Federal Constitution**.*" *Kahn v. Shevin*, 416 U.S. 351, 356, 94 S. Ct. 1734, 1737 (1974) (emphasis supplied, citation omitted, alteration in *Kahn* original).

In the present case, the purpose behind the 1985 Statute, namely, to establish protectionism for in-state interests and to discriminate against both interstate and foreign commerce, cannot be squared with the Federal Constitution. *See, e.g., Bacchus*, 468 U.S. at 270, 104 S. Ct. at 3054-55; *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876 n.6, 105 S. Ct. 1676, 1681 n.6 (1985) ("a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business"; "the state statute promoting a legitimate local interest must 'regulat[e] even-handedly' "

(citation omitted, alteration in *Metropolitan Life* original)). Since the purpose behind the 1985 Statute cannot be squared with the Federal Constitution, it cannot, as noted, qualify as a legitimate state purpose.

Second, Plaintiffs assert that the 1985 Statute is invalid under the Federal Equal Protection Clause for the reason that the classifications made by the Statute are not reasonable. To satisfy the Federal Equal Protection Clause, the classifications made " 'must rest on differences pertinent to the subject in respect of which the classification is made.' " *Western and Southern Life*, 451 U.S. at 668, 101 S. Ct. at 2083 (citation omitted); *see also Allied Stores*, 358 U.S. at 528, 79 S. Ct. at 441 ("classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation' " (citation omitted)). The "courts must reach and determine the question whether the classifications drawn in a statute *are reasonable in light of its purposes*." *McLaughlin v. Florida*, 379 U.S. 184, 191, 85 S. Ct. 283, 288 (1964) (emphasis supplied).

Putting to one side the true purpose of economic protectionism as set out above, the publicly stated justification for the special double tax on liquor products manufactured outside the State of Georgia was the "defraying [of] the increased costs of regulating the importation into this state of intoxicating liquors." *Heublein*, 351 S.E.2d at 196. Plaintiffs are entitled to prove that out-of-state and foreign liquor products do *not*, in fact, occasion increased per liter regulatory costs. To the contrary, Plaintiffs are entitled to prove that the per liter cost of regulating liquor products manufactured within the State of Georgia either approximates or *in fact exceeds*

the per liter cost of regulating liquor products manufactured elsewhere in the United States or abroad. Once that has been established, it will become readily apparent that the classifications drawn by the 1985 Statute do not " 'rest upon some ground of difference having a fair and substantial relation to the object of the legislation' " and are not "reasonable in light of [the stated] purposes."

In other words, even if one posits that the object of the 1985 Statute is to seek compensation for the costs of regulation, then there is certainly no warrant for imposing *a tax at **double the rate*** upon out-of-state and foreign liquor products when these products in fact occasion per liter regulatory costs at the same rate as or even at a lesser rate than do in-state liquor products. Indeed, if the object of the 1985 Statute is to recover regulatory costs occasioned by liquor products, then the classifications should be drawn such that the tax imposed upon in-state liquor products is the same as or greater than the tax imposed upon out-of-state and foreign liquor products. Of course, the 1985 Statute does precisely the opposite.[9]

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[9] The arbitrariness of these classifications in light of the publicly stated justification is, of course, really no accident. These classifications were simply not drawn to further the State's publicly stated justification and appear arbitrary when compared to a purpose for which they were not really designed. As the United States Supreme Court has said in a similar case, "Although the promotion of domestic business was not a purpose advanced by the States in support of their taxes in these cases, such promotion *is logically **the primary reason*** for enacting discriminatory taxes such as those at issue here." *Metropolitan Life*, 470 U.S. at 879 n.7, 105 S. Ct. at 1682 n.7 (emphasis supplied). But these other states, like Georgia here, must disguise their true protectionist and discriminatory

Defendants have moved for summary judgment as to Plaintiffs' Federal Equal Protection claims apparently on the ground that the *Heublein* decision assertedly constitutes a precedent adverse to any such claim. Again, however, a careful reading of the *Heublein* decision shows that the decision establishes no such precedent. In *Heublein*, the Georgia Supreme Court was, as noted, at pains to note that the taxpayer there had expressly forgone any and all challenge to the statute on the basis of purpose. 351 S.E.2d at 195-95. Because the purpose of the statute was so expressly "unchallenged," *id.* at 196, the Court accepted at face value and without further inquiry the State's stated purpose for the double taxation, "i.e., defraying the increased costs of regulating the importation into the state of intoxicating liquors," *id.* Therefore, when it came to deciding the Federal Equal Protection claim, the Court had no choice but to conclude that "the import tax is rationally related to the accomplishment of the [completely *"**unchallenged**"*] *legitimate state objective* of regulating the importation into the state of intoxicating liquor." *Id.* (emphasis supplied). As noted, Plaintiffs' Federal Equal Protection claims herein do involve a challenge to the purpose of the 1985 Statute and to the legitimacy of that purpose. The *Heublein* decision did not pass on a

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purposes in order to attempt to evade "the continuing viability of the Equal Protection Clause as a means of challenging a statute that seeks to benefit domestic industry within the State only by discriminating against foreign competitors." *Id.* 470 U.S. at 879, 105 S. Ct. at 1682; *cf. Postal Telegraph*, 249 U.S. at 259-60, 39 S. Ct. at 266-67 (under Commerce Clause challenge of tax-to-cost relation, court to determine on the evidence whether there is such relation or whether tax is "disguised attempt" to evade Constitution).

claim challenging purpose and, therefore, could not possibly constitute a precedent adverse to such a claim.

Further, as noted above, several further circumstances show that Defendants may not use the *Heublein* decision to preclude litigation of Plaintiffs' claims challenging purpose. To begin with, the newly disclosed evidence and facts (first disclosed either in the present case or in the *Beam* litigation – both occurring *after* the *Heublein* case) concerning the enactment of the 1985 Statute were neither produced nor considered by the courts in the earlier *Heublein* litigation. Moreover, Plaintiffs are entitled to present this evidence and the facts proven by it in support of their claims herein. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54, 58 S. Ct. 778, 784 (1938). The *Heublein* decision can, of course, have no preclusive stare decisis effect as to the legal import of evidence concerning purpose when that evidence was never presented or considered by the Georgia Supreme Court in the earlier case.

Moreover, Plaintiffs herein assert claims challenging purpose that are entirely different from the purpose claim that might have been asserted, but was not asserted, in the *Heublein* litigation. Thus, Plaintiffs have asserted that the 1985 Statute is a continuing violation of United States law. *E.g.*, Complaint (No. E-3793) ¶ 84. Further, Plaintiffs' claims challenging purpose concern later years of operation under the 1985 Statute. *See* Exhibits C-Q & S-V to Complaint (No. E-3793) . Of course, the *Heublein* decision could not possibly have any stare decisis effect precluding *claims that **did not even exist*** at the time *Heublein* was rendered in 1987. Finally, wholly apart from the evidence first disclosed in the later *Beam* action or in this case,

Plaintiffs intend to prove their purpose challenge by also using evidence concerning events in the more recent past. *E.g.*, Complaint (No. E-3793) ¶¶ 143-54. Again, Plaintiffs are entitled to present this evidence and these facts in support of their claims herein. *See Carolene Prods.*, 304 U.S. at 153-54, 58 S. Ct. at 784. The *Heublein* decision could not possibly have any stare decisis effect tending to preclude a challenge to purpose when that challenge is based on *events and violations occurring well after* the *Heublein* decision was rendered. *See also supra* Sections II.B.1.a.(i)(b) & II.B.1.a.(ii)-(iii).

For all these reasons, the *Heublein* decision is not and could not possibly be a precedent precluding litigation of Plaintiffs' Federal Equal Protection claims herein. Here, too, Defendants' motion must be denied.

D. Plaintiffs' Federal Due Process Claims Are Not Barred by the Stare Decisis Effect of the Decision in *Heublein, Inc. v. State*

Plaintiffs also assert Federal Due Process (Fourteenth Amendment) claims in this action. Plaintiffs assert these claims largely in the alternative and in supplementation of the statutory duty established in O.C.G.A. § 48-2-35 to refund with interest all erroneously or illegally collected taxes.

In the case of *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990), a unanimous United States Supreme Court examined the two alternative procedural methods by which a state may, consistently with the requirements of federal due process, afford fairness to the taxpayer whenever an invalid state

tax has been imposed. Under the first method, the state may provide the taxpayer with " 'an opportunity for a hearing ***before*** he is deprived of any significant property interest.' " 110 S. Ct. at 2250 (citation omitted, emphasis original). Under this method, the state must at a minimum and in clear and certain terms "allow [the taxpayer] to withhold payment" of the tax at the very outset and without incurring adverse consequences. *Id.* No such procedure was available to Plaintiffs at the time they paid the taxes at issue here. *E.g.*, Complaint (No. E-3793) ¶ 3.

If the state has "establish[ed] various sanctions and summary remedies designed so that [taxpayers][10] tender tax payments ***before*** their objections are entertained and resolved" and if, as "a result, [the state] does not purport to provide taxpayers . . . with a meaningful opportunity to withhold payment," then the state must provide taxpayers "with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to insure that the opportunity to contest the tax is a meaningful one." 110 S. Ct. at 2251 (citation omitted, emphasis original).

Under this second method, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 2247 (footnotes omitted). Typically, this means that the state would have "no choice but to 'undo' the unlawful deprivation *by refunding the tax previously paid* under duress, because allowing the

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State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" *Id.* at 2251 (citation omitted, alteration original, emphasis supplied).

Plaintiffs assert their Federal Due Process claims herein in order to enforce Georgia's obligation "to provide meaningful backward-looking relief," in other words its obligation "to 'undo' the unlawful [tax] deprivation" at issue here. *Id.* at 2247, 2251 (footnotes and citation omitted). This obligation largely parallels the obligation to refund in O.C.G.A. § 48-2-35, and thus, Plaintiffs' Federal Due Process claims are largely in supplementation of the claims asserted pursuant to O.C.G.A. § 48-2-35.

Defendants urge this Court to render judgment on Plaintiffs' Federal Due Process claims apparently on the ground that the *Heublein* decision assertedly constitutes a precedent against such claims. Nowhere in *Heublein* did the Georgia Supreme Court even mention the Due Process Clause of the Fourteenth Amendment, and that decision could hardly constitute any kind of precedent one way or the other on a claim based upon the Clause. Indeed, the *Heublein* Court expressly stated that the challenge before it involved only "the Equal Protection and Commerce Clauses" of the United States Constitution. 351 S.E.2d at 191.

This alone shows beyond peradventure that the *Heublein* decision is not and could not possibly be a precedent precluding litigation of Plaintiffs' Federal Due

Process claims herein. Here, too, Defendants' motion must be denied.

E. Plaintiffs' Claims Are Not Barred by Res Judicata or Collateral Estoppel

* * *

1. The Law of Res Judicata and Collateral Estoppel Generally

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2. Georgia's Rejection of the Doctrine of Binding Precedent; Claims of Plaintiffs Other Than Plaintiff Heublein, Inc. Unaffected by Res Judicata and Collateral Estoppel

* * *

3. Plaintiff Heublein, Inc.'s Current Claims Are Not Subject to Defenses of Res Judicata or Collateral Estoppel

* * *

a. The Instant Case Presents New Facts and New Evidence Based on New Events and

b. The Instant Case Presents Facts and Evidence Not Known to Plaintiff Heublein Inc. in 1985

* * * Additionally, Plaintiffs have set forth specific allegations of evidence, related to the enactment of the 1985 Statute, that was not produced to Heublein, Inc. or considered by the Court in the *Heublein* case. Complaint (No. E-3793) ¶ 133. The Fulton Superior Court relied upon precisely this evidence in the *Beam* litigation for the

Court's finding and holding that the purpose of even the Pre-1985 Statute was economic protectionism. *Id.* ¶ 134. The Georgia Supreme Court and United States Supreme Court affirmed this holding. *Id.* ¶¶ 135 & 140. This evidence was not before the Fulton Superior Court or the Georgia Supreme Court in the *Heublein* litigation.

Specifically, in *Beam* (filed in Fulton Superior Court in April 1987), the defendants there (who are also Defendants here) produced pursuant to a motion to compel uncontroverted evidence of the discriminatory and protectionist motivation and effect surrounding the enactment of the 1985 Statute. *See* Complaint (No. E-3793) ¶ 133. For obvious reasons, Defendants refused to produce these documents until compelled to do so by an Order of the Fulton Superior Court dated December 3, 1987. Until that time, which was long after the Georgia Supreme Court's January 7, 1987 decision in *Heublein*, these documents were in the sole possession of Defendants. Complaint (No. E-3793) ¶ 133; *see also* Affidavit of Harold V. Gorman, Exhibit GG to Plaintiffs' Notice of Filing (filed Oct. 16, 1992).

These documents, which were not before the courts in the *Heublein* litigation, confirm that the 1985 Statute made purely cosmetic changes and that the purpose and effect of the 1985 Statute remained the promotion and protection of Georgia's liquor industry and agricultural interests at the expense of interstate and foreign competition and at the expense of the economic order mandated by the United States Constitution. Complaint (No. E-3793) ¶¶ 134-35 & 140. Without the damning documents withheld in the *Heublein* litigation and the additional damning evidence disclosed in the present case,

Plaintiff Heublein, Inc. was simply not able to launch the challenge in the earlier litigation that Heublein, Inc. and the other Plaintiffs launch here.

* * *

c. The Instant Claim for a Tax Refund Covering Specific Years Has Never Been Presented to a Court

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d. Equity and Fairness Demand that Plaintiff Heublein, Inc. Not Be Excluded

* * *

F. Plaintiffs' Import Export Clause Claims Are Fully Supported by the Law

In 1976, the United States Supreme Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535 (1976), completely revamped the jurisprudence pertaining to the Import Export Clause under the United States Constitution. Before *Michelin*, the Import Export Clause jurisprudence directed the courts to examine whether a foreign good still had the status of an "import" at the time it became subject to a state exaction. Thus, for instance, the courts often inquired whether the foreign good was still within its original package at the time it became subject to the disputed state exaction. In 1976, the jurisprudence requiring this "inquiry" into the "status" of foreign goods "as imports and exports" was "*abandoned* in *Michelin*." *Washington Stevedoring*, 435 U.S. at 760, 98 S. Ct. at 1404 (emphasis supplied).

Starting with *Michelin*, the courts are directed to examine, not into whether a foreign good retained its status as an import at the time the state exaction became

applicable, but rather into whether the disputed state exaction should be regarded as constituting an Impost or Duty within the meaning of the Import Export Clause. In undertaking this new-fashioned inquiry, the court must "examine[ ] whether the [disputed state] exaction offended ***any of the three policy considerations*** leading to the presence of the [Import Export] Clause:

> "The Framers of the Constitution thus sought to alleviate three main concerns . . . : [1.] The Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2.] Import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the State; and [3.] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically."

Id. (quoting *Michelin*, 423 U.S. at 285-86, 96 S. Ct. at 540-41 (footnotes omitted and alteration in part in *Washington Stevedoring* original)).

Plaintiffs submit that the 1985 Statute, as it affects foreign goods, clearly contravenes at least the first two of *Michelin*'s three policies. First, as demonstrated above, the special double tax in the 1985 Statute (reserved for liquor products "manufactured" abroad and thereafter necessarily "import[ed]" into the State of Georgia,

O.C.G.A. § 3-4-60) is indistinguishable from a tariff. Further, the power to erect tariff and nontariff barriers is a power reserved "exclusive[ly]" to the Federal Government, *Michelin*, 423 U.S. at 285, 96 S. Ct. at 540, and Georgia's attempted exercise of this power indisputably interferes with the ability of the "Federal Government [to] speak with one voice when regulating commercial relations with foreign governments, [including when erecting] ***tariffs***, which [of course] might affect foreign relations." *Id.* (emphasis supplied). Second, once it is established that Georgia is in fact collecting tariff-like taxes on foreign goods through its 1985 Statute, then it likewise becomes indisputable that the 1985 Statute contravenes the second *Michelin* policy by "divert[ing] to the States" funds that should remain available as possible "import revenues" should the Federal Government decide to collect them. *Id.* 423 U.S. at 285, 96 S. Ct. at 540-41 (footnote omitted).

At this point, Defendants no longer rely upon the *Heublein* decision in seeking summary judgment, apparently conceding that the *Heublein* decision has no stare decisis effect. But Defendants still only argue the *legal sufficiency* of Plaintiffs' Import Export claims, making some two arguments. Defendants made precisely the same arguments in this case when they moved to dismiss. *See* Defendants' Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (dated Sept. 4, 1992); Defendants' Brief in Support of Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (dated Sept. 4, 1992); *see also* Defendants' Reply in Support of Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings (service dated Dec. 31, 1992). Again, Judge

Hull denied that motion, suggesting that Plaintiffs' Import Export claims are not resolvable on the purely legal grounds. *See* Order (filed Apr. 7, 1993). In any event, neither argument is legally valid. Further, at least one is also premature or inadequately presented.

First, Defendants tend to assert that Plaintiffs' Import Export claims must fail because the 1985 Statute assertedly does not contravene the third *Michelin* policy. Thus, Defendants emphasize that the Import Export Clause was designed to realize "a desire to maintain harmony among the States which would be disturbed if seaboard States could tax goods *'merely flowing through their ports to other States not situated as favorably geographically.'* " Defendants' Brief at 43-44 (citation omitted, emphasis in Brief original). It is true that Plaintiffs do not maintain that the foreign liquor products at issue in the present case " 'flow[ ] through [Georgia's] ports to other States *not situated as favorably geographically.'* " But this is by no means fatal to Plaintiffs' Import Export claims herein.

To begin with, Defendants' reliance upon the third *Michelin* policy as an absolute prerequisite to the applicability of the Import Export Clause ignores the United States Supreme Court's directive to the effect that the inquiry into whether a state exaction constitutes an Impost or Duty must "examine[ ] whether the exaction offended ***any*** *of the three policy considerations* leading to the presence of the Clause." *Washington Stevedoring*, 435 U.S. at 753, 98 S. Ct. at 1400 (emphasis supplied). Further, the United States Supreme Court has expressly stated that a showing that the disputed state exaction has contravened the third policy *is* ***not*** *a prerequisite to the applicability of the Import Export Clause*:

> Under the *Michelin* approach, any tax offending ***either of the first two*** *Import Export policies* becomes suspect ***regardless*** *of whether* [it contravenes the third policy by] creat[ing] interstate friction.

Id. 435 U.S. at 759, 98 S. Ct. at 1404 (emphasis supplied). In the present case, as shown, the 1985 Statute contravenes, not just one, but both of the first two *Michelin* policies.

Second, relying upon the ***1964*** *decision* in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 84 S. Ct. 1247 (1964), Defendants assert that the Import Export Clause is inapplicable because the 1985 tax is assertedly "only imposed in the case of distilled spirits [(and presumably alcohol as well) once these foreign liquor products have already] become a part of the mass of goods finally coming to rest in this State." Defendants' Brief at 44. To begin with, even if this inquiry were the correct inquiry to be undertaken by this Court, Defendants have raised it prematurely or inadequately. This inquiry – into whether the foreign liquor products at issue either 1) have still retained their status as imports at the time the 1985 Statute is imposed or 2) have "become a part of the mass of goods finally coming to rest" in Georgia at the time the 1985 Statute is imposed – obviously cannot be decided on the pleadings alone. Defendants may not use their *mere assertion* of facts, wholly unsupported by proof, to defeat Plaintiffs' Import Export claims on this summary judgment motion.

In any event, the inquiry Defendants urge upon this Court, namely into the foreign liquor products' status as imports at the time the 1985 Statute is imposed upon

them, is clearly no longer correct under the law. Not only did the United States Supreme Court put aside this status-as-import inquiry in *Michelin*, the Court (when repeatedly presented with this same type of now invalid argument) has expressly admonished that the "inquiry" into "when goods lose their status as imports and exports" was "***abandoned*** in *Michelin*." *Washington Stevedoring*, 435 U.S. at 760, 98 S. Ct. at 1404 (emphasis supplied); *see also Limbach*, 466 U.S. at 360, 104 S. Ct. at 1842; *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 153, 107 S. Ct. 506, 513 (1986).[11]

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[11] As part of their argument that this Court should inquire into the foreign liquor products' status as imports, Defendants apparently try to urge that the 1985 Statute imposes a tax upon the in-state use, consumption, or final delivery of these foreign liquor products in the State of Georgia. *See* Defendants' Brief at 44.

In making this assertion, Defendants first ignore the fact that the *use, consumption, or final delivery* nexus for the 1985 Statute already forms the basis for the universal tax under Subpart (1) applicable to all liquor products whether manufactured within Georgia, elsewhere within the United States, or overseas. *See also supra* Section II.B.1.b. Thus, when one turns to Subpart (2) of the 1985 Statute, which is not applicable to liquor products "manufactured" within the State of Georgia (so long as "manufactured" using "Georgia grown products"), *see* O.C.G.A. § 3-4-60 (3), this nexus has already been effectively exhausted.

Furthermore and more important, in making this argument, Defendants wholly ignore the very language of Subpart (2). Thus, Subpart (2) does not impose a tax, say, upon final delivery of foreign liquor products in Georgia as Defendants maintain. To the contrary, the 1985 Statute clearly states that the tax "shall be imposed *upon the* ***importation*** *for* use, consumption, or final delivery." O.C.G.A. § 3-4-60 (2) (emphasis supplied). The 1985 Statute then goes on to make clear that this special double tax

In fact, to the extent that Defendants urge this Court to rely upon that part of the 1964 decision in *Department of Revenue v. James B. Beam Distilling Co.* pertaining to the status-as-import inquiry, it should be noted that the United States Supreme Court has since that time specifically referred to this part of its decision in *Beam Distilling* as no longer good law:

> ***Before Michelin***, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original-package doctrine of *Brown v. Maryland*, 12 Wheat. 419, 6 L.Ed. 678 (1827); see, e.g. ***Department of Revenue v. James B. Beam Distilling Co.***; *Anglo-Chilean Corp. v. Alabama*; *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872), **overruled in** *Michelin Tire Corp. v. Wages*.

Washington Stevedoring, 435 U.S. at 752, 98 S. Ct. at 1400 (emphasis supplied). In any event, as noted, the status-as-import inquiry has since expressly been "abandoned." *Id.* 435 U.S. at 759, 98 S. Ct. at 1404.[12]

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shall not apply to liquor products not so imported because "manufactured" within the State of Georgia (from Georgia grown products). *Id.* § 3-4-60 (3).

[12] Finally, to the extent Defendants suggest that, under the Twenty-First Amendment, Georgia is free to violate the Import Export Clause, it was precisely the *Beam Distilling* decision, among others, upon which Defendants rely that established that the Twenty-First Amendment did not operate as a pro tanto repeal of the Import Export Clause, 377 U.S. at 345-46, 84 S. Ct. at 1249-50:

> To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has

For all these reasons, Defendants' motion for summary judgment on Plaintiffs' Import Export claims must be denied.

G. Plaintiffs' Assertion of the Supremacy Clause Is Fully Supported in Law

* * *

H. Plaintiffs' Individual Capacity Claims

* * *

I. Defendants Never Even Address Many of Plaintiffs' Claims

> completely repealed the Export-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor its history leads to such an extraordinary conclusion. *This Court has never intimated such a view, and now that the claim for the first time is squarely presented, we expressly reject it.*

(Emphasis supplied). This part of *Beam Distilling* (unlike the part concerning the status-as-import inquiry) has never been questioned.

Further, the *Beam Distilling* case in fact supports Plaintiffs' Import Export claims herein. In that case, the Kentucky tax was imposed upon the " *'transporting* or *shipping* [of the] distilled spirits under consideration *into th[e] state.'* " *Id.* 377 U.S. at 343, 84 S. Ct. at 1248 (citation omitted, emphasis supplied). In other words, the Kentucky tax was very similar to the 1985 Statute, which imposes the tax "upon the *importation" into the State of Georgia* of the foreign liquor products at issue here. O.C.G.A. § 3-4-60 (2) (emphasis supplied). In *Beam Distilling*, the Court easily concluded that this sort of tax "is *clearly* of a kind prohibited by the Export-Import Clause." 377 U.S. at 343, 84 S. Ct. at 1248 (emphasis supplied).

* * *

J. Plaintiffs' Seventh, Eighth, and Ninth Claims Are Legally Sufficient

* * *[13]

K. Defendants Have Failed to Show the Absence of Genuine Issues to Be Tried

In addition to presenting the grounds discussed (and refuted) above (concerning the legal sufficiency of Plaintiffs' claims and, with respect to Plaintiff Heublein, Inc., concerning the doctrines of collateral estoppel and res judicata) in support of their motion for summary judgment, Defendants also present evidentiary materials. *See, e.g.*, Defendants' Brief at 38-39. It's difficult to know with respect to which of Plaintiffs' claims, or which factual elements within which of Plaintiffs' claims, Defendants have submitted this evidentiary material.

As noted above, relying upon the express language of the *Bacchus* and other decisions, Plaintiffs are bringing, among other claims, a dormant Interstate Commerce Clause claim based upon "discriminatory purpose." *See Bacchus*, 468 U.S. at 270, 104 S. Ct. at 3054-55. Before presenting their evidentiary materials, Defendants devote a substantial part of their briefing to an argument that no such purpose challenge exists in law. *See, e.g.*, Defendants' Brief at 28-38. Plaintiffs therefore assume that Defendants have presented these evidentiary materials in an attempt to demonstrate the absence of a disputed

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question of fact with respect to another category of Plaintiffs' claims – presumably, with respect to Plaintiffs' claims under the Interstate Commerce Clause based upon "discriminatory effect." *Bacchus*, 468 U.S. at 270, 104 S. Ct. at 3054-55. Plaintiffs show below that, as to the factual issues they do raise, Defendants have failed to prove the absence of a genuine or substantial issue of fact. Plaintiffs further show that Defendants have omitted to address other relevant factual issues under the claims they do discuss. Similarly, as to claims they fail to address at all, Defendants have omitted to address any of the relevant factual issues.

1. There Are Genuine Issues of Material Fact under the Discriminatory Purpose and Effect Claims Brought under the Interstate Commerce Clause

Defendants' evidentiary showing rests almost entirely upon an affidavit of Herman Oliver – although there is some cumulation supplied through the affidavits of others on some points. Note, for instance, that substantial parts of Paragraphs 5-44 of Defendants' Statement of, *etc.*, the Material Facts (No. E-3793) (dated Aug. 27, 1997) are identical or substantially identical to Paragraphs 5-46 of the Affidavit of Herman Oliver of August 21, 1997 (No. E-3793). Certainly, the critical Paragraph 29, with its many Subparagraphs (a) through (x), of the Statement of the Material Facts finds its exact counterpart in Paragraph 26 of the Oliver Affidavit of August 21, 1997 – one of only a handful of affidavit paragraphs cited in Defendants' Brief at 39.

Mr. Oliver's analysis of the alleged differential in the cost of regulating out-of-state product versus in-state product is faulty and illogical on many counts, frequently compounds the discrimination against out-of-state product, is designed to respond to the wrong legal inquiry, in turn fails to address the relevant factual issues and legal inquiries, and is otherwise disputed by Plaintiffs and their evidentiary materials. For all these reasons, Defendants' evidentiary materials fail to establish the absence of genuine or substantial issues of material fact. Defendants' motion for summary judgment must therefore be denied.

In Subparagraphs 26(g), 26(i) & 26(s), in addition to committing more total-volume errors (discussed below), Mr. Oliver makes the suggestion (his only one in the Affidavit) that travel costs are higher *per unit* in the case of out-of-state product than in the case of in-state product. Plaintiffs dispute whether Georgia actually sends agents out of state or overseas in order to regulate out-of-state product. Of course, Mr. Oliver purports to have personal knowledge of all of the "facts" stated in his Affidavit. *See* Oliver Affidavit of August 21, 1997 (E-3793) ¶ 1. In the Affidavit, Mr. Oliver maintains that the "State incurred, and continues to incur, much greater travel costs and expenses vis-à-vis all of the out-of-state licensees and products, *both for regulatory purposes and for tax audit purposes.*" *Id.* ¶ 26(h) (emphasis supplied). In his deposition, Mr. Oliver stated that, as for audit purposes, the Central Audit Department (and not the Alcohol and Tobacco Tax Unit) sends auditors out of state to "*any type* [of manufacturer] taxpayers that needs to be audited, but they do alcohol manufacturers as well." Deposition of

Herman Oliver ("Oliver Dep.") at 14 (emphasis supplied). Indeed, the Central Audit Division has described its main purpose as insuring compliance with tax laws by the State's larger corporate income tax, sales tax, and motor fuel taxpayers, totally omitting alcohol excise or import taxes. *See* Deposition of T. Jerry Jackson ("Jackson Dep.") at 39-40. And as to Central Audit's alcohol tax audits, Mr. Oliver admitted that he had no idea of how often such tax audits happen in a year: "No. I know that they do them." Oliver Dep. at 14. As for trips to audit overseas manufacturers, Mr. Oliver stated, "I don't have any records of that. That would have to be, Central Audit would have to answer that." *Id.* Of course, Central Audit has not placed any evidence before the Court.

As for auditors sent out of state to manufacturers for other reasons, at the time of his deposition, Mr. Oliver states that, in the year prior to his deposition, "We sent auditors to witness destruction of stamps or do a check of the – might do some checks of out-of-state manufacturers for compliance violation, and also to check, witness destruction of tax stamps." *Id.* at 15. *But Mr. Oliver could not recall a single instance when such a trip had been made,* even during the last year that he was chief of the audit section. *Id.* As to how often auditors go to out-of-state suppliers, "There's no certain schedule." *Id.* at 13. During the last ten years of Mr. Oliver's tenure as chief of the audit section of the ATT Unit, Mr. Oliver could not give an estimate of how often out-of-state audits or trips occurred. *Id.* at 17. And, significantly, Mr. Oliver testified that he had *never* calculated how much it costs to maintain the auditing staff for in-state and out-of-state manufacturers: "I don't have any figures, but it's lots." *Id.* at

15. In his deposition, Mr. Oliver would not even venture to give an estimate of the amount spent on auditing in-state and out-of-state manufacturers. *Id.* As to how much it costs to regulate out-of-state products generally or in-state products generally, Mr. Oliver had to acknowledge that he had never performed a study. *Id.* at 17-18. Moreover, Mr. Oliver had no knowledge of any information supplied to the General Assembly when the 1985 Statute was passed. *Id.* at 18-19; *see also* Deposition of Marcus E. Collins, Sr. ("Collins Dep.") at 92.[14]

Moreover, Plaintiffs are unaware of any such out-of-state regulatory travel and undertakings in the case of their own product and operations – with the possible limited exception of some travel in connection with the *now-repealed* tax stamp system. *See* Affidavit of James Fisher ("Fisher Affidavit") ¶¶ 6 & 7; Affidavit of Stanley Schwam ("Schwam Affidavit") ¶¶ 6, 7 & 8; Affidavit of Robert Guttag ("Guttag Affidavit") ¶¶ 6 & 7; Affidavit of Paul Thorpe ("Thorpe Affidavit") ¶¶ 6 & 7; Affidavit of Julie Kinch ("Kinch Affidavit") ¶¶ 6 & 7. Even when Plaintiffs have requested that agents travel outside Georgia in order to, say, verify the destruction of stamps, the State of Georgia has required that the producer reimburse the State for the travel expenses including the expense of transportation and accomodations. *See, e.g.*, Schwam Affidavit ¶ 7.

Further, with respect to travel costs and any other cost that appears to be associated with regulation taking place outside the borders of the State of Georgia, Mr.

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Oliver's analysis fails to take into account a regulatory device Georgia has developed precisely to reduce or eliminate any such cost. To reduce or eliminate any such cost, Georgia requires every licensed supplier of out-of-state product to appoint an in-state registered representative. The Alcohol and Tobacco Division is empowered to deal with and, in fact, does deal with these registered representatives, and all such dealings are regarded as dealings with an agent of the supplier and, as such, as dealings directly with the supplier. *See, e.g.*, Revenue Rules § 560-2-3-.22; *see also* Fisher Affidavit ¶ 3; Schwam Affidavit ¶ 3; Guttag Affidavit ¶ 4; Thorpe Affidavit ¶ 3; Kinch Affidavit ¶ 3. At one point, but for different purposes entirely, Mr. Oliver acknowledges the existence of this regulatory device and concedes that each of the Plaintiffs "had a registered representative *physically present* in the State." *See* Oliver Affidavit of August 21, 1997 (No. E-3793) ¶ 43 (emphasis supplied). But he fails to factor this regulatory device and the conceded presence of these registered representatives in the State into his analysis of any differential in regulatory costs. Further, before one can conclude that there are higher per-unit travel costs in the case of out-of-state product, one must take into account the greater *incidence* of travel in the case of in-state product. Only in the case of in-state product does Georgia regulate the manufacture of product, including the requirement that the product "be made from Georgia grown products," O.C.G.A. § 3-4-60(3),[15]

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[15] Again, at the very outset of this litigation in their Complaint, Plaintiffs noted that this was yet another way in which the 1985 Statute demonstrated *on its very face* economic protectionism and discrimination. To maintain their exemption

and regulate the post-manufacture storage of product at the plant site. Georgia's regulation of these stages of the process – in the case of in-state product only – logically gives rise to costs, including travel costs, not incurred in the case of out-of-state product. An honest per-unit analysis of cost would put an addition in the in-state column to account for these costs unique to in-state product or a subtraction, or credit, in the out-of-state column. Mr.

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from the second part, or second half, of the double tax, even the in-state manufacturers must be sure to manufacture their product using "Georgia grown products." *See* O.C.G.A. § 3-4-60 (3).

* * * Nowhere in Mr. Oliver's analysis has he taken the additional costs associated with this regulation into account – again, regulatory costs entirely peculiar to in-state product. Moreover, the requirement that product be made from "Georgia grown products" is clearly designed to afford protection to in-state agricultural producers, another form of economic protectionism and discrimination on the very face of the statute:

> The inclusion of the tacked-on subpart (3) of O.C.G.A. § 3-4-60, with its express protection of "Georgia grown products," made it painfully obvious once again on the very face of the statute (and in language taken directly, but for the omission of a hyphen, from the unconstitutional pre-1985 statute) that the whole plan to enact a new statute almost identical in form and substance to the double-taxing pre-1985 statute was simply designed to avoid the mandate of the United States Supreme Court's 1984 *Bacchus* decision and to continue in place the economic protectionism that the State of Georgia had always maintained was its prerogative under the Twenty-First Amendment.

E.g., Complaint (No. E-3793) ¶ 112.

Oliver's analysis of travel cost makes no such account, however.

Finally, the whole purpose of Mr. Oliver's analysis of regulatory cost would seem to be to justify the imposition of a doubled tax on out-of-state product alone. Thus, wherever a higher per-unit cost of regulating out-of-state product is isolated, to complete the analysis, Mr. Oliver must quantify that cost and compare it to the amount of revenue brought in by the double tax on out-of-state product alone. Mr. Oliver does not undertake this analysis in the case of any of the regulatory costs he discusses, including travel costs. This failure to complete the analysis undermines and ultimately eliminates the probativeness of what he does have to say. Further, Plaintiffs with their own submission of evidentiary materials (some of which are summarized in the table following) demonstrate that the revenue intake from the second part, or the second half, of the tax – imposed exclusively upon out-of-state product – exceeds by many multiples the cost of regulating all alcoholic beverages (whether in-state product or out-of-state product) and certainly exceeds any quantified per-unit higher travel cost differential for out-of-state product.

* * * Mr. Oliver intimates that an allegedly higher (per-unit?) travel cost differential for out-of-state product justifies imposing the second part, or second half, of the tax exclusively upon out-of-state product. He suggests that there may be occasion for revenue agents from two different administrative groupings within the Revenue Department to travel beyond the borders of Georgia in connection with out-of-state product: 1) revenue agents within the Alcohol and Tobacco Tax Unit (sometimes

"ATT Unit"), historically within the Field Services Division within the Revenue Department (and only recently upgraded to a division itself) and 2) revenue agents from the Central Audit Division. Entry R.1 in the table shows the budget request for all of the travel expenses for all of the ATT Unit in 1984: $1,622. Likewise, table entry V.1 shows the actual travel expenses for all of the Central Audit Division in 1984: $497,505. But neither administrative unit within the Revenue Department is solely concerned with the tax on out-of-state liquor and wine. The ATT Unit, for instance, has responsibilities with respect to tobacco taxes, motor fuel taxes, motor carrier taxes, motor vehicle registration, and ad valorem taxes on motor vehicles. *See* Jackson Dep. at 23-25. Likewise, even with respect to alcoholic beverages and the taxes thereupon, the ATT Unit has responsibilities with respect to the taxes on malt beverages. *See id.* at 26-27. Of course, even with respect to the taxes on liquor and wine, the ATT Unit is not solely involved with administering those taxes with respect to out-of-state product; after all, the first half of this tax is also imposed upon in-state product. To get a sense of the relative amounts of taxes the ATT Unit is responsible for collecting, one should note that the tax on tobacco yielded $85,340,116 in 1984 (table entry II.1). Similarly, the tax on malt beverages, also collected by the ATT Unit, yielded $55,848,805 in 1984 (table entry JJ.1). By contrast, even combined, the taxes on liquor and wine yielded the lesser figure of $49,946,415 in 1984 (table entries Y.1 & DD.1). The responsibilities of the Central Audit Division, within the Revenue Department, are remote from taxes on alcoholic beverages and much more wide ranging than those of the ATT Unit. The major

objective here is to insure that each taxpayer audited is correctly reporting all tax liabilities. *See* Jackson Dep. at 35-36. The sorts of tax liabilities that a taxpayer would be audited for by the Central Audit Division include sales tax liabilities, income tax liabilities, unclaimed property liabilities, and motor fuel tax liabilities. *See id.* at 36. Mr. Jackson, the Deputy State Revenue Commissioner at the time of his deposition and now the Commissioner, didn't know of any other kind of tax liabilities that a taxpayer would be audited for by the Central Audit Division. *See id.* at 36 ("I don't know of the others, I'm not aware of any others").[16]

The Central Audit Division has described its main purpose as one to insure compliance with Georgia's tax laws by the larger taxpayers who should pay approximately 80 percent of the State's corporate income tax, sales tax, and motor fuel tax, and Mr. Jackson – although he thought there should also be a reference to smaller taxpayers – said that this was basically correct. *Id.* at 39-40. Again, the focus – the " 'main purpose' " – is entirely upon insuring compliance with the corporate income tax, the sales tax, and the motor fuel tax. This main purpose the Central Audit Division begins to make clear the ambiguity, discussed above, in Mr. Oliver's affidavit testimony when he speaks of audits conducted by the Central Audit Division in connection with "tax audit purposes" as distinguished from regulatory purposes. When Mr. Oliver talks of travel costs incurred by the Central Audit Division in connection with the manufacturers of out-of-state alcoholic beverages, could it be that

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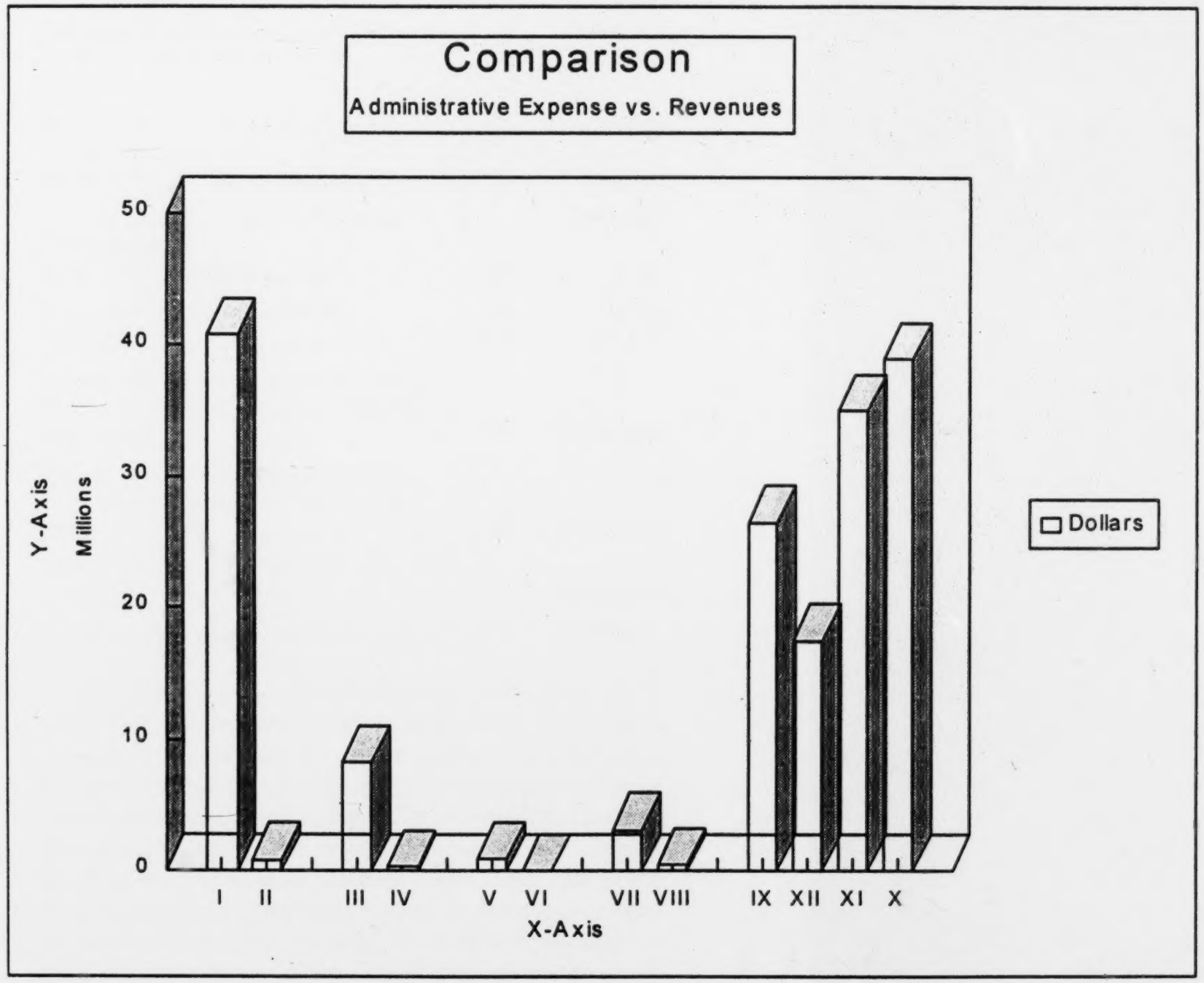
he is suggesting that there might be an occasion to audit such a manufacturer in connection with the State's corporate income tax? If this is what he is saying, then this isn't a regulatory cost peculiar to the regulation of out-of-state alcoholic beverages. The distinction being made would be one between out-of-state corporations generally and in-state corporations, regardless of the type of business involved.

But even assuming that all of the ATT Unit's travel expenses were incurred – not in carrying out its responsibilities with respect to tobacco taxes, motor fuel taxes, motor carrier taxes, motor vehicle registrations, ad valorem taxes on motor vehicles, malt beverage taxes, or taxes on in-state wine and liquor – but rather exclusively in carrying out its responsibilities with respect to the taxes on out-of-state wine and liquor, those expenses come to a total of approximately $1,622 in 1984. Likewise, even assuming that the Central Audit Division incurred all of its travel expenses – not in carrying out its responsibilities with respect to the State's corporate income tax, sales tax, other income tax, unclaimed property, or motor fuel tax – but rather exclusively in connection with out-of-state wine and liquor, those expenses come to a total of $497,505 in 1984. Combined, the travel expenses for these two administrative units within the Revenue Department totaled $499,127 in 1984. By contrast, the amount of revenue collected by Georgia with the second half of the tax imposed exclusively on liquor amounted to approximately $17.5 million. (Table entry AA.1). And the amount of revenue collected by Georgia with the second half of the tax imposed exclusively on out-of-state wine amounted to something more than $9 million in 1984.

(Table entry FF.1). Even assuming that all of this travel expense was incurred solely in connection with out-of-state wine and liquor, it is dwarfed by the amount of the revenue brought in by the second half of the tax exclusively imposed upon out-of-state wine and liquor:[17]

17 * * *


Comparison
Administrative Expense vs. Revenues
50
40
30
20
10
0
Y-Axis
Millions
I II III IV V VI VII VIII IX XII XI X
X-Axis
Dollars

Revenue Department Expenditures	I	40,814,194
Revenue Department Travel Expense	II	836,102
Field Services Division Expenditures	III	8,243,863
Field Services Travel Expense	IV	250,965
ATT (Alcohol, Tobacco, Tax)Unit Expenditures	V	891,452
ATT Unit Travel Expenses	VI	1,622
Central Audit Expenditures	VII	3,119,139
Central Audit Travel Expenses	VIII	497,505
Actual Revenue on Second Half from Out-of-State Product (Liquor and Wine)	IX	26,500,000
Actual Revenue on Second Half from Out-of-State Product (Liquor only)	XII	17,500,000
Actual Revenue on Out-of-State Product (Liquor only)	XI	35,000,000
Alcoholic Beverage Tax Revenues	X	38,959,833

* * * In Subparagraphs 26(d), 26(e), 26(f), 26(j), 26(k), 26(l), 26(m), 26(n), 26(o), 26(p), 26(r), 26(s), 26(t), 26(u), 26(v), & 26(w) (as well as in others of the Subparagraphs), Mr. Oliver commits an error in his analysis that might be called the error of total volume. No one disputes that, by total volume, there is more out-of-state product in Georgia than there is in-state product. Thus, if the rate of the cost of regulation is the same by unit both for out-of-state product and in-state product, nevertheless because of total greater volume in the case of out-of-state product, the cost of regulating out-of-state product will be higher

than the cost of regulating in-state product. *Even if the per-unit cost is less for out-of-state product than it is for in-state product*, because of the much greater total volume in the case of out-of-state product, the cost of regulating out-of-state product will still exceed the cost of regulating in-state product. Throughout these Subparagraphs, Mr. Oliver fails to differentiate between total volume cost and per unit cost. Indeed, whenever he does make clear what he is talking about, it always turns out that he is talking about total volume costs. *See, e.g.*, Oliver Affidavit of August 21, 1997 (E-3793) ¶ 26(f). Moreover, throughout these Subparagraphs, by speaking of the allegedly greater costs "required to regulate the out-of-state *manufacturers* than the in-state *manufacturers*," *e.g.*, *id.* (emphasis supplied), Mr. Oliver makes clear that he is purporting to compare the cost of regulating the manufacture of out-of-state product to the cost of regulating the manufacture of in-state product in his analysis. As shown above, the cost of regulating the manufacture of out-of-state products is ***nonexistent***. By definition, the cost of regulating the manufacture of in-state product is greater than the nonexistent cost of regulating the manufacture of out-of-state product. This error, together with the persistent errors of total volume, undermines and essentially eliminates the probativeness of Defendants' entire evidentiary showing with respect to the alleged differential in the cost of regulating out-of-state product versus in-state product. * * * [18]

As the Georgia legislators themselves acknowledged when enacting the 1985 Statute:

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> It takes little analysis to conclude that out of state wine and distilled spirit beverages are discriminated against in the Georgia alcoholic beverage tax structure. . . . As long as there is some competition between locally produced products receiving a preference and other products from outside the state, *there is a* **discriminatory effect** by the statute.

First Transcript at 9-10 (emphasis supplied).

In its interlocutory discovery Order of June 17, 1997, this Court tended to acknowledge the propriety generally of a Commerce Clause claim challenging discriminatory purpose, but concluded that such a challenge would not seem to be possible "in the case at bar" because the Georgia Supreme Court in *Heublein* had already found the purpose of the 1985 Statute to implicate the Twenty-First Amendment. *See* June 17, 1997 Order at 4-5. Plaintiffs reiterate their position that the *Heublein* decision cannot constitute an adjudication of a discriminatory purpose challenge with preclusive effect for the case at bar for the reason that the plaintiff in that case, as found by the Georgia Supreme Court, forwent a challenge to purpose. *See Heublein*, 256 Ga. 578, 351 S.E.2d 190, 195-96 (plaintiff "stated before the trial court that 'we are not sitting here and challenging what the state says their purpose was in adopting this legislation' "). Accordingly, when the Georgia Supreme Court discussed the stated purpose and its relation to the Twenty-First Amendment, its discussion was explicitly couched in the context of an "unchallenged purpose." *Id.* at 196; *see also id.* ("Heublein maintains this argument [omitting a challenge to purpose] before this court as well"). Plaintiffs submit that they cannot be precluded from making a challenge to discriminatory

purpose because of an earlier case in which a plaintiff failed to assert such a claim. It would be ironic indeed if the omission by a plaintiff in an earlier case to make a legally available challenge to discriminatory purpose – and the further circumstance that the decision in that case turned on that omission – were to become a precedent precluding all future plaintiffs from asserting the discriminatory purpose challenge the earlier plaintiff omitted to make.[19]

The June Order also tended to acknowledge the propriety of a Commerce Clause claim challenging "a statute whose purpose was discriminatory and improper on its face." June 17, 1997 Order at 4. But, again, the Order appears to have concluded that even such a limited challenge to purpose is not available in the case at bar because the plaintiff in the *Heublein* case failed to make any kind of challenge to purpose, resulting in a decision adverse to that plaintiff on account of its failure to make a challenge to a purpose. In this connection, Plaintiffs point out that they, unlike the plaintiff in *Heublein*, are making a challenge to discriminatory purpose, including a challenge involving purposes for the 1985 Statute that are discriminatory and improper *on the face of the statute*. As noted in the Complaint (No. E-3793) at ¶¶ 112 & 125-127

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[19] Further, it should be noted that, in its *later* decision in 1989 – after the 1987 *Heublein* decision – in the case of *James B. Beam Distilling Company v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989), the Georgia Supreme Court affirmed a "purpose" finding based upon a record consisting entirely of evidence concerning the enactment of the 1985 Statute and did so without limiting its inquiry to the relation of the stated purpose to the Twenty-First Amendment. *Beam*, 382 S.E.2d at 96.

and *supra* in this Memorandum, the 1985 Statute reveals economic protectionism and discrimination on its very face in at least two respects. Neither of these two facial challenges to purpose was made by the plaintiff in *Heublein;* the plaintiff in *Heublein* made no challenge to, or abandoned, **all challenge to purpose *whether facial or otherwise***. It is respectfully submitted that these aspects of the instant Plaintiffs' challenge to purpose were not before this Court at the time of the discovery matters resolved by the June Order.

Finally, the June Order acknowledged the propriety of what one might call a 'backdoor' challenge to purpose, a challenge to purpose through a challenge to effect: when "the effect of the statute" – say, through incongruence with the purpose asserted by the state in defense of the statute – "prove[s] that the purpose was improper and discriminatory." *See* June 17, 1997 Order at 4; *see also id*. (acknowledging a challenge to the statute that "prove[s] that its effect does not satisfy its stated purpose"). With particular reference to this last kind of discriminatory effect challenge, Plaintiffs submit that they have resuscitated the discriminatory purpose challenge by demonstrating above that Defendants' effect evidence does not satisfy the stated purpose of the 1985 Statute and by demonstrating, at a minimum, that these factual questions present genuinely and substantially disputed issues of fact.

Moreover, the discriminatory purpose challenge in this case has been resuscitated in an entirely different way. Defendants themselves have opened the door by putting the actual legislative history of the 1985 Statute and the 1992 Statute in issue. For instance, Defendants

have submitted affidavits purporting to establish what information was actually before the Georgia General Assembly at the time it was considering and enacting the statutes at issue in this case. For instance, through Mr. Oliver, the Defendants have submitted that the General Assembly was knowledgeable about and familiar with the regulatory costs Mr. Oliver analyzes when it enacted the 1985 Statute. *See, e.g.*, Oliver Affidavit of August 21, 1997 (No. E-3793) ¶ 49. Again, Defendants, through the affidavit of Robert Lenihan, have put into issue the information actually before the General Assembly and other details of the drafting and legislative history, and even the so-called "lobb[ying]" history, in the case of both the 1985 Statute and the 1992 Statute. *See, e.g.*, Affidavit of Robert J. Lenihan, Jr. (No. E-3793) ¶¶ 5 & 7. Defendants are not permitted, in fairness, to put these factual matters into evidence, as they have already done, while at the same time attempting to preclude Plaintiffs from demonstrating through the submission of their own evidence that these factual matters are very much in dispute in this case. Moreover, under well-established principles, Defendants have now opened the door. It is well established that where evidence may be otherwise inadmissible, it may be admitted where the party opposing its admission opens the door to the subject matter. *See Tiftarea Shopper, Inc. v. Maddox*, 187 Ga. App. 227, 369 S.E.2d 545, 546 (1988); *Sheffield v. State*, 184 Ga. App. 141, 361 S.E.2d 28, 30 (1987); *Mulkey v. State*, 250 Ga. App. 487, 298 S.E.2d 487, 489 (1983). Counsel cannot object to evidence, even where such evidence is unfavorable to the client, if counsel "left the field wide open" for its admission. *Tiftarea*, 369 S.E.2d at 546. Moreover, once a party has opened the

door, it is of no consequence that the party may not have intended to open the door so wide. *Sheffield*, 361 S.E.2d at 30; *Grant v. State*, 178 Ga. App. 398, 343 S.E.2d 422, 424 (1986).

2. "What I'm Telling You Is that There Is a Piece of Legislation in the Governor's Office that Provides the Tax Benefits to *OUR OWN PEOPLE* and *OUR OWN AGRICULTURAL PRODUCTS, Both With Respect to Alcohol Tax on Distilled Spirits and on Domestically Produced Wine*"[20]

The double-taxing 1985 Statute was enacted in spring of 1985, but Georgia had been imposing discriminatory double taxation (under what is sometimes called the Pre-1985 Statute) for many decades before 1985. The discriminatory double taxation of the 1985 Statute is a mere continuation of the discriminatory double taxation of the Pre-1985 Statute. The Pre-1985 Statute has now been struck down as unconstitutional and a violation of the Commerce Clause. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991). The present lawsuit is an effort to do the same as to the 1985 Statute.

The crisis for Georgia's discriminatory taxation scheme began in 1984. In June of 1984, the United States Supreme Court, relying upon the Commerce Clause,

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[20] Third Transcript at 11 (emphasis supplied); *see* Affidavit of Jeffery T. Coleman of Sep. 25, 1997 and Affidavit of Joan Ana-Leo attaching transcripts of legislative tapes (herein sometimes "First Transcript," "Second Transcript," and "Third Transcript").

struck down an Hawaii tax scheme that discriminated against out-of-state alcohol products. *See Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984). Until that time, several states (Georgia among them) continued to discriminate against out-of-state alcohol products in ways that were clearly in violation of the Commerce Clause. The 1984 *Bacchus* decision made crystal clear, however, that the Twenty-First Amendment was not a pro tanto repeal of the Commerce Clause as to liquor products. Therefore, such discrimination would no longer be tolerated in the case of liquor products just as it had never been tolerated in the case of any other article of interstate or foreign commerce. 468 U.S. at 274-77, 104 S. Ct. at 3056-58. Once the *Bacchus* decision came down in June of 1984, the hold-out states with discriminatory tax systems quickly concluded that such discrimination was no longer constitutionally tenable. In some of these jurisdictions, the implicated state officials (of the state attorney general's office and the state revenue department) took bold action by declining to apply and implement their own state tax statutes in a discriminatory fashion, even in advance of corrective action by the state legislature.[21] The Georgia officials were not so bold, but they did carefully monitor what was happening in the other affected states in order to consider what their options were in correcting

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[21] The legislative discussion in the Georgia House, at the time of the enactment of the 1985 Statute, likewise took note of these developments. *See* First Transcript at 21 ("The State of Tennessee, in view of the Bacchus decision, has already reversed itself. The State of Virginia has reversed itself. The State of Florida has reversed itself, and they've gone into, they've got a court litigation going on in this case down there now").

Georgia's discrimination against out-of-state alcohol products. *See* Lenihan Dep. at 148-49, 151-52.

By early September of 1984 (just a few short months after the June 1984 decision in *Bacchus*), Georgia officials concluded that the Georgia tax scheme (with its so-called "preferential tax," preferring in-state product and suppliers over out-of-state product and suppliers such as Plaintiffs herein) was unconstitutional. *See* Lenihan Dep. at 153-54 (after review, Revenue Department concluded it had concerns about the *Bacchus* decision). Further, Georgia officials (of the Georgia Revenue Department, after consulting with officials of the Georgia Law Department) concluded that the unconstitutionality should be corrected by equalizing the tax. The tax on in-state liquor and wine would be brought up to and equalized at the level of taxation already imposed upon out-of-state liquor and wine. That was the option they chose for responding to *Bacchus*.

The equalization bill the Georgia officials were proposing is contained in Plaintiffs' Proffered[22] Exhibit W.[23] Mr. Ed Vaughn (now deceased), then Director of the Alcohol & Tobacco Tax Unit of the Georgia Revenue Department, was forwarding the proposed equalization bill to Mr. Bobbie Lenihan, the Revenue Department's legislative liaison. *See* Lenihan Dep. at 71 (Vaughn

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[22] As to the proffered exhibits, *see infra* note 43.

[23] *See also* First Transcript at 7-27; Second Transcript at 1-9 (the Revenue Department's proposed equalization bill later became a proposed amendment, proposing equalization instead of the import approach bill, which ultimately became the 1985 Statute).

assisted Lenihan with alcohol beverages issues). Mr. Lenihan would submit the equalization bill to the Georgia General Assembly for adoption in the upcoming 1985 legislative session as a way of correcting, in Mr. Vaughn's words, the illegal pre-1985 "preferential tax treatment for in state distillers and vint[n]ers," now clearly unconstitutional in light of "the U. S. Supreme Court Decision in the State of Hawaii case." Plaintiffs' Proferred Exhibit W, at 1.

The Georgia officials charged with applying the discriminatory tax scheme had clearly concluded that the scheme was unconstitutional. If the Georgia officials had been permitted to follow their own best judgment, this unconstitutionality would have been corrected by early 1985. And the present lawsuit would never have come about. But it didn't happen that way.

The in-state distillers and their lobbyist lawyers had caught wind of the proposed equalization bill. These lobbyists included 1. Mr. J.R. Cullens, then at the Atlanta firm of Freeman & Hawkins (assisted by his son 2. Mr. Joseph R. Cullens and by 3. Mr. Dan E. White), and 4. Mr. William T. Divine, Jr., at the Albany firm of Divine, Wilkin, Raulerson & Fields. For decades, the in-state distillers had enjoyed a huge competitive advantage vis-à-vis out-of-state distillers because of the economic protectionism afforded by the preferential tax. And they weren't about to surrender to the United States Supreme Court without a fight. The in-state distillers recognized that the blatantly discriminatory and protectionist double taxation under the Pre-1985 Statute could not simply continue after the *Bacchus* decision. They recognized that the Pre-1985 Statute had to go. But they devised a certain guise or subterfuge by which they hoped to continue the

same double taxation under another name. The subterfuge they developed came to be known as the *import approach.*

Under the import approach, the historic first half of the tax would be applied, as before, to all liquor products regardless of origin. The historic second half of the tax would be renamed an import tax and applied to all liquor products "imported" into the State of Georgia. Of course, since the in-state products, by definition, could not be "imported" into Georgia, the in-state products would never become subject to the second tax. Further, since all out-of-state products must necessarily cross over a Georgia state border, all out-of-state products would become subject to the second tax. The net effect of the import approach would be that the same discriminatory and protectionist double taxation of the Pre-1985 Statute would go on in precisely the same manner as before – but under a new "import" name.

The in-state producers, when developing their so-called import approach, failed to comprehend, however, that importing an article across a border from one state into another state is just another name for conducting ***interstate*** commerce. In other words, the in-state producers' proposed import-approach tax would place a tax directly on the conduct of interstate commerce. It cannot be any more obvious but that a tax directly upon interstate commerce is a blatant violation of the Commerce Clause.[24] But the in-state producers would do what they

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[24] *See supra* Section II.B.1.b., discussing *Freeman*, 329 U.S. at 253, 67 S. Ct. at 277 (to tax specially and uniquely the mere

had to in order to preserve their unconstitutional competitive advantage. Their efforts to get the import approach enacted into law simply set up the resultant statute, however, for yet another kind of a fall: a Commerce Clause violation on account of economic protectionism and discrimination in both purpose and effect. In other words, the 1985 Statute is unconstitutional as a direct tax on interstate and foreign commerce. It is also unconstitutional on the ground of discrimination.

By late December of 1984, the in-state producers were ready to combat the equalization bill (Plaintiffs' Proferred Exhibit W) the Georgia officials were proposing. Plaintiffs' Exhibit 2 to the Affidavit of Max Hess contains a

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instantaneous and interstate act of transporting a product across a border from one state to another state would be to tax "the very process of interstate commerce"); *see McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S. Ct. 1023, 1026 (1944) (tax on in-state sale or in-state use permissible, but "a tax on an *interstate sale* . . . involves an assumption of power by a State which the Commerce Clause was meant to end" (emphasis supplied)); *Norton*, 340 U.S. at 539, 71 S. Ct. at 381 ("shipp[ing]" from one state to customers in another state was "so clearly interstate in character" as to be "not subject to . . . tax"); *Michigan-Wis. Pipe Line Co.*, 347 U.S. at 170, 74 S. Ct. at 403 (as a good travels interstate, states may not each separately tax as a "first taking" the exportation of the good outside the state and as a "first unloading" the importation of the good into the state); *see also Oregon Waste*, 144 S. Ct. at 1350 ("it is well-established, however, that a law is discriminatory if it " 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.' " *Chemical Waste, supra*, at – , 112 S. Ct., at 2014 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S. Ct. 2620, 2622, 81 L. Ed. 2d 540 (1984)). See also *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 286, 107 S. Ct. 2829, 2841, 97 L. Ed. 2d 226 (1987)" (footnote omitted)).

memorandum by Messrs. Joseph Cullens and Dan White to Mr. J.R. Cullens. The memo acknowledges that the Pre-1985 Statute cannot simply go on and that there will have to be some kind of "Amendment to O.C.G.A. § 3-4-60." The memo proposes that this amendment should follow the import approach. In fact, the memo authors drafted a proposed import-approach bill and attached their draft bill as the final exhibit to the memo. The draft bill, proposed by Messrs. Cullens and White, rather clumsily sets up a variety of stated or declared purposes to justify the double-taxing import approach:

> to require in the manufacture for sale within this state of all alcohol spirits that such spirits be made from Georgia-grown products; to regulate the quality control of distilled spirits; to aid in the exercise of the police power; to promote temperance; and for other purposes.

See Final Exhibit attached to Plaintiffs' Exhibit 2 to Hess Affidavit.

A quick perusal of the memo to which the draft bill is attached shows that Messrs. Joseph Cullens and Dan White had no factual basis for suggesting that the double-taxing import approach they were proposing would in fact further these stated purposes. It's clear that neither gentleman conducted any factual investigation whatsoever. Moreover, these stated purposes, as designed by Messrs. Joseph Cullens and Dan White, studiously avoid any mention of the obvious power pursuant to which Georgia would be purporting to act if it adopted their draft bill: not the "police power" as recited in the draft bill, but quite obviously *the taxing power*. *Compare Holcombe v. Georgia Milk Producers Confederation*, 188 Ga.

358, 3 S.E.2d 705, 709 (1939) (distinguishing between the police power and the taxing power).[25]

With the circulation of this memo in late December 1984,[26] the in-state producers and their lawyer lobbyists had begun their effort to repeal the Pre-1985 Statute and to replace it, not with the equalization bill proposed by the Revenue and Law Departments, but rather with the so-called import-approach bill drafted by Messrs. Joseph Cullens and Dan White. Remarkably, despite strong resistance to the import approach from both the Revenue Department and the Law Department, as will be shown below, the bill as drafted by Messrs. Joseph Cullens and Dan White did become the law of Georgia a few months later.

As part of the effort to get the import approach enacted into law, Mr. Divine recruited Mr. George D. Busbee. Mr. Busbee had once been a partner with Mr. Divine in Albany before becoming Governor and was, by

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[25] It would make no difference in the end: " '*Neither the power to tax* ***nor*** *the police power* may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.' " *West Lynn*, 114 S. Ct. at 2211 (citation omitted, emphasis supplied).

[26] Judging by the distribution list on the last page, the memo was also circulated to Mr. Divine (among many others). Moreover, the handwritten notation on the first page of the memo, in the version contained in Plaintiffs' Exhibit 2 to the Hess Affidavit, shows that a copy was also circulated on December 21, 1984, as a copy, to Mr. Jeff Milsteen of the Georgia Law Department.

this time (late 1984 and early 1985), back in private practice at the Atlanta firm of King & Spalding. Mr. Busbee was recruited to the effort presumably in order to allow the in-state producers to make their pitch Governor to Governor as it were. And that is how it happened: Messrs. Divine and Busbee went directly to the then-Governor of Georgia, Mr. Joe Frank Harris.

The in-state producers' pitch to Governor Harris in support of the import approach came in the form of a memo from Messrs. Divine and Busbee dated January 15, 1985. *See* Plaintiffs' Proffered Exhibit M. The contents of the memo to Governor Harris[27] reveal who these in-state producers were: "Viking Distillery" of Albany, Georgia; "Barton Brands of Georgia, Inc." of Atlanta, Georgia; the "Monarch Wine Company" of Fulton County, Georgia; and various unspecified "small vineyards . . . in North Georgia," including "one winery [recently] built."[28] *Id.* at

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[27] The memo is addressed to Governor Harris, but other documents show that it was distributed more widely, including to the Georgia Law Department and to both Mr. H. Perry Michael and Mr. David A. Runnion of that Department. *See* Plaintiffs' Proffered Exhibit J (referring to "the memo of January 15, 1985 from William T. Oliver [a/k/a Divine] and George D. Busbee to Governor Harris and . . . the Freeman and Hawkins firm memo referred to").

[28] Whereas the initial version of the import-approach statute drafted by Freeman & Hawkins concerned only liquor (presumably because the Freeman & Hawkins and Divine firms only did lobby work on behalf of in-state liquor producers), the approach has been slightly broadened by January of 1985 to include in-state wine as well (presumably because the King & Spalding firm, once recruited to the effort, had pointed out that its in-state vintner clients were equally affected by the *Bacchus* decision and would have to seek continued protection as well in

1-3. The Divine and Busbee memo acknowledges that the purpose of the Pre-1985 Statute was all along economic protectionism. *See, e.g., id.* at 1, 4. Further, the memo tends to take the position that even the Pre-1985 Tax Statute was a tax upon importation. *See id.* at 1. Further, the memo acknowledges that the Pre-1985 Statute has got to go because the decision "in the *Bacchus* case . . . brings into question the constitutionality of the present Georgia law." *Id.* at 3. Then, in a clear case of self-contradiction, the memo urges Governor Harris to support the import approach as a way of continuing the long-standing Georgia "public policy" of economic protectionism and as a way of continuing the tax on importation. If the old tax was constitutionally infirm, as Messrs. Divine and Busbee conceded, then how would a new tax doing the same thing be any less infirm?

The legislative discussion in the Georgia House at the time of the enactment of the 1985 Statute was equally clear that the *Bacchus* case, coming out of Hawaii, applied with equal force to Georgia and showed Georgia's Pre-1985 Statute to be unconstitutional.[29] The legislators

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the form of an import-approach statute). Apart from the inclusion of in-state wine, the import-approach statute as originally proposed by Messrs. Cullens and White remains intact.

[29] *See* First Transcript at 2 ("That decision called Bacchus Imports Ltd. against Dias, which was decided in June of 1984, dealt with that state's legislation that was, *as ours was originally designed to do,* intended to enhance and improve local industry in the State of Hawaii" (emphasis supplied)), 7 ("Back in 1937 and 1938, during that session, we gave certain interests, primarily we are speaking of the alcoholic beverage interests, a tax exemption of 50% of the taxes if they would produce alcohol

acknowledged that Georgia had all along had a policy of economic protectionism both for the in-state alcoholic beverages industry and for the in-state agricultural industry.[30] They also admitted that the proposed import-approach bill, soon to become the 1985 Statute, was intentionally designed to make "*no change in the existing tax structure*, but to adjust the method of collection." *E.g.*, Second Transcript at 4 (emphasis supplied).[31] They admitted that "it *has not been changed at all*, gentleman

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within the state from products grown within the state. Since that time, and only recently, the Supreme Court of the United States of America, Bacchus Ltd. v. Dias, Director of Taxation of Hawaii, has ruled that *this exemption clearly violates the interstate commerce clause and thereby is unconstitutional*" (emphasis supplied)), 9 ("The Georgia alcohol beverage tax structure, summarized above, *clearly violates this fundamental constitutional premise*" (emphasis supplied)), 9 ("It takes little analysis to conclude that out of state wine and distilled spirit beverages *are discriminated against in the Georgia alcoholic beverage tax structure*" (emphasis supplied)) & 22 ("It was put in the law in 1937 and 1938, but in 1984 it *was ruled unconstitutional by the U.S. Supreme Court* of this land" (emphasis supplied)).

[30] *See, e.g.*, First Transcript at 2 ("Not the least of which was to encourage industry to come into Georgia and use our agricultural products, to use the products that the farmers that many of you represent, to use the labor of the people that we all represent, and to enhance the economy of this state by the making of jobs and the use of Georgia products. Over the years we have had these industries in our state. In recent times we have seen legislation that has been passed that has been designed to encourage the development of a wine industry in the State of Georgia").

[31] *See also, e.g.*, Second Transcript at 11 ("doesn't all this legislation do is leave the tax on distilled spirits just like it is now, except restructure the theory on which the tax is imposed?").

from the 67th. The gentleman from the 12th's bill *continues to provide the same favorable treatment as the law that's on the books now.*" Third Transcript at 13 (emphasis supplied). "The total import is that it makes ***no change.***" *Id.* (emphasis supplied). If the Pre-1985 Statute was not meaningfully distinguishable from the Hawaii statute and therefore constitutionally infirm under *Bacchus* and if the then still-proposed 1985 Statute made "no change" and just "continue[d] to provide the same favorable treatment as the law that's on the books now," *id.*, then it followed that *Bacchus* would apply equally to render the 1985 Statute unconstitutional as well – although it might take awhile. And this point was well understood on the floor of the Georgia House as well:

> DISTRICT 133 (Tommy Chambless): Well, sir, now you understand that the Hawaiian decision dealt with an unfair and unequal sales tax on distilled spirits in the state of Hawaii, not an import tax, do you not?
>
> DISTRICT 150 (Tom Crosby, Jr.): Yes, sir, I'm also referring to the attorney general's office of this state telling us that it [*Bacchus*] also ***applies equally here*** on the present tax that we have [*i.e.*, the proposed import tax that became the 1985 Statute].

See First Transcript at 22-23 (emphasis supplied).

But the thrust of the Divine and Busbee memo is not so nuanced. Messrs. Divine and Busbee describe in great detail various benefits assertedly accruing to the State of Georgia on account of the long-standing policy of economic protectionism. *See* Plaintiffs' Proffered Exhibit M at

1-3. They go on to threaten that, if the policy of economic protectionism is not left in place, "these local industries [will] undoubtedly . . . re-locate." *See id.* at 4. This was likewise the thrust of the legislative discussion demanding adoption of the 1985 Statute. These same details were taken directly from the Divine and Busbee memo (which was cited by name, *e.g.*, First Transcript at 11, and described as a "position paper," *id.* at 17) and given as a justification for the continuation of the policy of economic protectionism through the adoption of the 1985 Statute.[32] The proponents of the so-called import approach bill that became the 1985 Statute – all members of the House from Districts where the in-state liquor and wine industries who benefit from this protectionism were located – were frank in their desire to protect the in-state industries located in their Districts, regardless of the damage generally, by continuing the policy of protectionism with the adoption of the 1985 Statute:[33]

> The import tax obviously would not apply to domestically produced products, and this would

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[32] *E.g.*, First Transcript at 11 ("They buy 200,000 bushels of corn a year from the local farmers"), 17 ("is it not true that contrary to your earlier statement that one of these distilleries does in fact provide that grain free to Georgia farmers? Cattle feed?"), 17 ("Is it not true that one of these distillers pays over a half million dollars to the City of Albany – just utility costs alone? DISTRICT 150 (Tom Crosby, Jr.): That's their position paper on it, yes").

[33] One is reminded of Chief Justice Weltner's valedictory concurrence in 1992 where he encouraged Georgia's courts to "stand fast against the unceasing efforts of subsidy-seekers, and against their demands for tax preference and protectionism." *Davis v. City of Macon*, 262 Ga. 407, 421 S.E.2d 278, 279 (1992).

> gain the additional $.50 and yet maintain the position that our distilleries in the State of Georgia have on a $.50 break. Now this is important to many of us, all over the state. We've got a large distillery in Albany, Georgia – Viking Distillery, which is a part of – a subsidiary of Glenmore Distilleries. There is a very large distillery here in Atlanta – by Barton Brands, owned by Barton Brands. The kind of money that is generated into the economy of this state through the sale and purchase of agricultural products, the payrolls that are generated in Fulton and surrounding counties for the people who work in this plant, and in the southwest Georgia area is significant. We have capital that has been invested in the State of Georgia by these manufacturers. We have an ever growing wine industry in this state. Now the wine industry, let me make this clear, the wine industry is not affected by House Bill 463. The taxation of wine is in an entirely different portion of the code. But a piece of legislation that very closely tracks House Bill 463 has been introduced by the gentlemen from the 12th (Bubba McDonald, Jr.) and others, and I believe we will have an opportunity in the near future to take a look at that legislation too and to provide the same sort of relief and change in the law that we are attempting to do here with House Bill 463.

See First Transcript at 4-5;[34] *see also, e.g.*, Third Transcript at 12 ("I'm completely in favor of the gentleman from the

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[34] Ultimately, the contents of the two import-approach bills referred to here – one for distilled spirits and high-content alcohol and one for wine – were combined and, once passed, became the 1985 Statute.

12th helping our – especially our wine industry, because he and I share that industry"). The same point was made with respect to the need to continue the policy of protectionism for in-state agricultural interests by adopting the 1985 Statute:

> I think one of the primary reasons this legislation was ever passed was to encourage the use of domestically grown farm production, and I think *we need to continue that* theory.

See id. at 6 (emphasis supplied). Again:

> [T]he measure that I'm now bringing before you . . . *will give the favorable tax preference to the agricultural products* ***of this state.***

See Third Transcript at 11 (emphasis supplied).[35] At the end of the legislative proceedings that gave rise to the 1985 Statute, there was this stunning admission:

> What I'm telling you is that there is a piece of legislation in the Governor's office that provides the tax benefits to ***our own people and our own agricultural products,*** *both with respect to alcohol tax on distilled spirits and on domestically produced wine.*

Id. (emphasis supplied).

The Divine and Busbee memo also made the claim that, without a policy of economic protectionism, Georgia

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[35] *See also, e.g.*, First Transcript at 6 (by the same token, the legislators were very clear that, if out-of-state product were involved, the protectionist benefit would not be available: "if they used products that are not Georgia grown, then the benefit that they receive under this legislation would not be there – that's correct").

"would [be] put . . . at a competitive disadvantage with the 19 states now providing similar incentives." *See* Plaintiffs' Proffered Exhibit M, at 4. This was nonsense. The Commerce Clause establishes a "unitary national market," in effect a free trade zone, among the many states. *See West Lynn*, 114 S. Ct. at 2211. Just as it requires Georgia to resist the temptation to set up special "incentives" and special "competitive" advantages for its "local industries," *see* Plaintiffs' Proffered Exhibit M, at 4-5, the Commerce Clause requires all the other states to do the same. The Georgia officials saw the obvious fallacy of the Divine and Busbee contention here. Indeed, one such official (apparently Mr. Runnion when reviewing the Divine and Busbee memo) rejected the competitive disadvantage argument by writing next to it by hand the obviously true observation that there is no such competitive disadvantage because "Bacchus affects *all states*." *See id.* at 5 (emphasis original).[36] In other words, if 19 other states did indeed provide such protectionist incentives, those incentives would have to go as well. This argument was also made in the House: Did Georgia not have to afford economic protectionism in order to compete with the possible economic protectionism in neighboring states? *See* First Transcript at 21. But a ready, and correct, rebuttal was also given:

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[36] Indeed, if Messrs. Divine and Busbee were urging here a kind of failing industry defense of Georgia's policy of economic protectionism, the United States Supreme Court has repeatedly rejected such a defense under the Commerce Clause. *See, e.g., West Lynn*, 114 S. Ct. at 2213 n.12 (citing *Bacchus*, among other cases).

> No, sir, I don't think so. I think that *all states is going to come down to have an equal tax rate so that they can comply with the commerce clause* that is deemed by the Supreme Court of this land.

Id. (emphasis supplied). When it decided nonetheless to reenact and continue the policy of economic protectionism, the Georgia General Assembly was on full notice of the unconstitutional course it was embarking upon.

In the end, however, the in-state producers were not offering, or even attempting to offer, sound reasoning in support of a continued policy of economic protectionism. Instead, they were simply inviting Governor Harris, and Georgia, to defy the United States Constitution and the United States Supreme Court while hiding this defiance behind carefully crafted declared purposes for the new proposed import-approach statute. Thus, the in-state producers urged Governor Harris, not to change the situation created by the Pre-1985 Statute, but rather to *"Leave the 'status quo' as it was before Bacchus* by amending the Georgia Statute to provide [for an import approach, while declaring that it was being] done under police powers." *See* Plaintiffs' Proffered Exhibit M, at 4 (emphasis supplied). The in-state producers left no doubt about the defiant stance they were urging Georgia to take: In fact, they commanded, *"[D]o not let U.S. Supreme Court change state public policy." See id.* (emphasis supplied).

The in-state producers' lobbying efforts paid off. Soon there were two separate import-approach bills. Taken together, the two bills were designed to repeal the Pre-1985 Statute and its counterpart for wine and to replace them with the import-approach: 1. the import-approach bill for liquor was House Bill 463 sponsored by

Representative Chambless of the 133rd District and others (*see* Plaintiffs' Proffered Exhibit X) and 2. the bill for wine was House Bill 564 sponsored by Representative McDonald and Representative Russell, respectively of the 12th District and of the 64th District (*see* Plaintiffs' Proffered Exhibits Y & II).

The Georgia officials charged with implementing and applying Georgia's tax statutes (and, indeed, further charged by their oaths of office with upholding the Georgia and United States Constitutions as well) did not take this initial success on the part of the in-state producers lying down. Indeed, these Georgia officials had already long since concluded, as far back as September of 1984, that the constitutionally correct way to respond to the *Bacchus* decision was to repeal the Pre-1985 Statute and to equalize the tax. *See* Plaintiffs' Proffered Exhibit W. But, instead of the equalization they had proposed, these officials now found themselves confronted with the so-called import approach being pushed by the in-state producers.

Director Vaughn, on behalf of the Revenue Department, reviewed the proposed House Bill 463 to adopt the import approach for liquor. *See* Plaintiffs' Proffered Exhibit X. Director Vaughn made the most basic point of all: "[T]he U. S. Supreme Court [has] ruled that such preferential taxes [are] unconstitutional as being in violation of the commerce clause." *Id.* at 1. He then carefully enumerated some six criticisms of the proposed bill. First, he noted that, if the discriminatory import tax were later struck down as unconstitutional, a strong likelihood, Georgia would end up collecting only the half tax on both out-of-state and in-state liquor – thereby suffering a huge revenue loss. *See id.* at 1. Director Vaughn estimated what

the second half of the tax would bring in. If it were struck down, the revenue loss would be "approximately 17 1/2 million dollars per year." *Id.*; *see also id.* at 3 ("Possible annual loss of approximately 17 million dollars").

Director Vaughn's five remaining criticisms have to do with the practical problems and administrative costs of introducing a new name (*i.e.*, import tax) for the same old tax. *See id.* at 1-2. Importantly, Director Vaughn then assigns an actual figure for these increased administrative costs: "It is estimated that the increased costs of collection would be approximately $75,000 per year." *Id.* at 2. Director Vaughn was not making the point that the out-of-state products are somehow more expensive to regulate. Instead, he was making the simple point that, if Georgia took the same old second half of the double tax under the Pre-1985 Statute and renamed it an "import tax," then there would necessarily be an administrative cost associated with the renaming. New tax stamps might have to be issued bearing the words "Import Tax." The reporting forms might have to be reworked to accommodate the change in vocabulary. Perhaps two sets of forms (one set for each half, or part, of the double tax) would have to be distributed and then collected back and tallied – all where one form had done the job in the past. All of this was likely to cost "approximately $75,000 per year." *Id.*

Director Vaughn made the same criticisms of the proposed import-approach bill for wine, House Bill 564. *See* Plaintiffs' Proffered Exhibit Y. Again there is the fundamental point that the entire bill is unconstitutional:

> In 1984 the U. S. Supreme Court held preferential excise taxes on alcoholic beverages to be unconstitutional as violative of the commerce

> clause. [Nevertheless, this b]ill appears to be designed to attempt to maintain preferential taxes for Georgia wines.

See id. at 1.[37]

Director Vaughn reiterated his remaining criticisms here as well. Again, he noted that, if the second half of the double tax were successfully challenged as would likely be the case, the result would be another "serious revenue loss" for Georgia. Director Vaughn estimated the revenue from the second half of the tax and, thus, correspondingly the revenue loss in the event of unconstitutionality to be "approximately 9.1 million dollars in revenue collections" each year. *Id.*; *see also id.* at 1 ("Possible loss of 9.1 million dollars if import tax held invalid"). Further, the effort to collect the same old tax under the guise of a new name (*i.e.*, import tax) could result in additional "administrative costs" associated with "new reporting forms and auditing procedures." *Id.* at 2. Director Vaughn said that these costs were difficult to determine, but he estimated them "to be approximately $20,000.00." *Id.* at 1.

The Georgia Law Department was no less critical of the in-state producers' so-called import approach. In Plaintiffs' Proffered Exhibit J, Mr. David A. Runnion

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[37] For obvious reasons, Revenue officials now shy away from the term *preferential taxes*. The legislators in 1985 had no such compunctions. *E.g.*, First Transcript at 8 ("preferential excise tax structure"), 12 ("preferential tax benefit that the liquor industry is now enjoying"); Second Transcript at 4 ("preferential tax break on the distilling of alcohol on home grown – where they use home grown products"), 4 ("the preferential tax break I'll say, on wines as well as alcohol").

describes the situation quite succinctly. Mr. Runnion reports that the *Bacchus* decision condemns discriminatory taxation "in favor of local [alcohol] products," whether discriminatory in "purpose" or "effect," as a "violat[ion of] the Commerce Clause" – "the Twenty-First Amendment notwithstanding." *See* Plaintiffs' Proffered Exhibit J, at 1. Mr. Runnion acknowledges that, even in the area of alcohol and "the Twenty-First Amendment notwithstanding," "traditional Commerce Clause considerations" will henceforth be applied to strike down discriminatory taxation. *Id.* Mr. Runnion goes on to acknowledge that the Pre-1985 Statute and its counterpart for wine "clearly do favor local alcohol industries." *Id.* at 2. In light of this favoritism and the *Bacchus* decision, Mr. Runnion joins Director Vaughn and the other Revenue officials in calling for equalization:

> [T]he only way to completely assure no revenue loss to the State in this area is to amend the foregoing two statutes to impose equal tax rates on all alcoholic beverages.

Id.

Finally, Mr. Runnion also had something to say about the proposed import approach then being pushed by the in-state producers. Mr. Runnion acknowledges that reliance upon the Twenty-First Amendment would allow Georgia more leverage and flexibility "in a purely regulatory context." *Id.* Of course, the proposed import-approach statute did not really involve regulating the act of importation in any way whatsoever. It was not a case of regulation, but a case of taxation – taxation designed to continue, under a new guise, the discriminatory economic protectionism of the Pre-1985 Statute. After all,

Messrs. Divine and Busbee (to whom Mr. Runnion referred) expressly stated that the import approach was designed as a method of "Keeping 'Status Quo' " and as a method of "Continu[ing] long-standing policy of state," a "Georgia public policy and . . . purpose . . . to promote the manufacture of liquor and wine in Georgia with Georgia products." *See* Plaintiffs' Proffered Exhibit M, at 1, 4 (sentence order altered). Therefore, Mr. Runnion observes that, in this case (a case not involving "a purely regulatory context," but rather a straightforward taxing measure), the import approach proposed by the in-state producers would "clearly" have the *effect* of "favor[ing] local alcohol industries." Indeed, that was also the *purpose*: "[T]he real desire" as well "even in the new legislation [*i.e.*, the proposed import approach] is to favor local alcohol industries." *See* Plaintiffs' Proffered Exhibit J, at 2. These same points were made in the General Assembly, albeit by the minority who opposed the so-called import approach of the 1985 Statute:

> The distinction these writings [*i.e.*, the Divine and Busbee, Plaintiffs' Proffered Exhibit M, and the Freeman & Hawkins memo, Plaintiffs' Exhibit 2 to Hess Affidavit] attempt to extract from Bacchus regarding state control over importation of alcohol has substantial merit in a purely regulatory context. Here, ***where the real desire, even in the new legislation, is to favor local alcohol industries,*** I do not feel it would be a winning argument.

See First Transcript at 11 (emphasis supplied).[38] This clearsighted analysis, criticism, and rejection by both

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[38] The proponents, in the majority, of the new legislation were no less frank about their desire to continue favoring local

Revenue Department and Law Department officials of the proposed import approach came to naught. In fact, the carefully considered subsidiary criticisms by Director Vaughn (1. revenue loss once the invalid second-half of the tax is severed and 2. increased administrative cost of introducing new reporting forms), instead of serving as reasons to reject the import approach, were reworked as ways to try to bolster the import approach.

In response to Director Vaughn's criticism that the proposed import tax would be unconstitutional and would be struck down as such, leaving a revenue loss of some $17.5 million in the case of liquor and $9.1 million in the case of wine, the in-state producers devised a scheme to try to protect against this eventuality. The in-state producers developed a plan to have the General Assembly pass a bill that would in fact equalize the tax (just as the Revenue and Law Departments had been urging since at least as far back as September of 1984).

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industry. *E.g.*, First Transcript at 22 ("the provision that favors Georgia products is already in the law and has been from the very beginning"); Third Transcript at 11 ("the measure that I'm now bringing before you, and will give the favorable tax preference to the agricultural products of this state"), 12 ("I'm completely in favor of the gentleman from the 12th helping our – especially our wine industry, because he and I share that industry"), 13 ("The gentleman from the 12th's bill continues to provide the same favorable treatment as the law that's on the books now"), 13 ("The difference between the favorable tax that our domestic products receive disappears in House Bill 463 [the so-called one-day fallback statute], which will be the first signed and will be superseded by this gentleman from the 12th's bill," the 1985 Statute reinstating, after one day of equalization, "the favorable tax that our domestic products receive").

But the equalized tax would never become effective because, according to the in-state producers' plan, the General Assembly would repeal the equalized tax the very next day and then pass the import-approach statute instead. The import-approach statute would, as is customary, contain a severability clause. And that clause would specify that, in the event of unconstitutionality, the preexisting law would fall back into place. Of course, under the in-state producers' scheme, the preexisting law would be the one-day equalized tax statute. This whole scheme (involving a fallback equalized statute buried in the session laws, ready to pop up into existence whenever the present 1985 Statute is determined to be unconstitutional) was apparently devised by Mr. Busbee assisted by Mr. Floyd C. Newton III.[39]

In other litigation involving this same 1985 Statute, the United States District Court made these findings about the in-state producers' fallback scheme:

> In 1985, the Georgia General Assembly engaged in some legislative acrobatics to retain the essential structure of the taxation system, yet insulate it from the Commerce Clause jurisprudence crystalized in *Bacchus*. On March 31, 1985, the Assembly approved an act which equalized the excise tax on imported and domestic alcoholic beverages. However, the

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[39] Messrs. Busbee and Newton were working for "Glenmore Distilleries," another in-state producer. *See* Plaintiffs' Proffered Exhibits EE & FF. They were perhaps further assisted by others at the King & Spalding firm who were generally working on this matter. *See* Plaintiffs' Proffered Exhibits K & L (Mr. Joseph B. Haynes, Mr. Nolan C. Leake, Mr. W. Edgar Spivey).

> equalized tax had no time to become effective, because the next day the Assembly passed another act, the current version of O.C.G.A. § 3-4-60. This statute reimposed the differential tax on imported alcoholic beverages, although it is phrased slightly differently from the pre-1985 statute. . . . The April 1, 1985 Act contained a non-severability clause which provided that the March 31, 1985 version would be reinstated should the later version ever be held invalid or unconstitutional.

Age Int'l, Inc. v. Miller, 830 F. Supp. 1484, 1487-88 (N.D. Ga. 1993) (dismissing "on jurisdictional grounds," *id.* at 1502), *aff'd*, 37 F.3d 637 (11th Cir. 1994). In this manner, the in-state producers accepted the best advice of the Georgia Revenue Department and the Georgia Law Department (that the continuing Commerce Clause violation could only be corrected by equalizing the tax, *see* Plaintiffs' Proffered Exhibits W & J), but only accepted that advice for a single solitary day, using the equalized tax statute as a trick in a series of "legislative acrobatics" designed to attempt to "insulate [the double-taxing structure] from the Commerce Clause jurisprudence," while in the end doing nothing more than "retain[ing] the essential structure of the taxation system [and] reimpos[ing] the differential tax on imported alcoholic beverages" all over again. *See id.* at 1487. The proponents of what the United States District Court called "legislative acrobatics" had an interesting time trying to explain this scheme to their colleagues, *see* Third Transcript at 4-5, 11-14, prompting one of them to query: "You know, no sneaks or anything?" *Id.* at 14. The answer: No, "Nothing sneaky about it." *Id.*

Director Vaughn's second subsidiary criticism (subsidiary to the main criticism that the import approach would be every bit as unconstitutional as the Pre-1985 Statute) met with similar distortion. As noted, Director Vaughn pointed out that, if the second half of the tax (imposed exclusively upon out-of-state product) were simply renamed as an import tax, Georgia would presumably have to issue new tax stamps denominated import-tax stamps, to issue new reporting forms, and so forth. He estimated that these increased administrative costs would be approximately $75,000 in the case of liquor and $20,000 in the case of wine. *See* Plaintiffs' Proffered Exhibits X & Y. "At present *these taxes*[40] are collected by a revenue excise tax stamp method." *See* Plaintiffs' Proffered Exhibit X, at 3 (emphasis supplied). Vaughn noted that Georgia could avoid these increased administrative costs by continuing to use the "excise tax stamp method" to collect the double tax once renamed as an "import tax." *See* Plaintiffs' Proffered Exhibit X, at 3. But if Georgia didn't go through the motions of reworking and reissuing all its paperwork to make it consistent with the new "import tax" name and, instead, continued to use the old paperwork, it would be even more evident that the new import-approach taxation system was a mere continuation of the old and admittedly unconstitutional taxation system under the Pre-1985 Statute. In other words, if it failed to revise the paperwork, Georgia

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[40] Clearly, Revenue officials well understand that "these taxes," whether the old double taxes on out-of-state product or the new import taxes on out-of-state product, were one and the same.

would leave the import-approach statute even more vulnerable to constitutional challenge: "To clearly separate the excise tax from the import tax would require new reporting forms and auditing procedures *and without so separating the taxes a constitutional challenge appears to be more evident.*" *See* Plaintiffs' Proffered Exhibit Y, at 2 (emphasis supplied).

As it turned out, Georgia never did develop new paperwork using the "import tax" nomenclature. Accordingly, the increased administrative costs foreseen by the Revenue Department for new paperwork ($75,000 for liquor and $20,000 for wine) were never in fact incurred. But the Revenue Department's expression of concern over the increased administrative costs (associated with *the manner of collecting* the new import tax) did become an occasion for the in-state producers to refine their import approach in an entirely different respect. The in-state producers would use this talk of increased administrative costs to justify planting a factual assertion in the legislative history of the 1985 Statute, by which the General Assembly would purport to find

> that the cost of regulating and administering the manufacture, distribution, and sale of alcohol, distilled spirits, table wines, and dessert wines consumed in this state is greater for imported alcohol, distilled spirits, table wines, and dessert wines than it is for alcohol, distilled spirits, table wines, and dessert wines produced within this state and further finds and determines that it is in the best interest of the citizens of this state that the increased costs be provided for by taxation.

1985 Act § 1 (Complaint (No. E-3793) Exhibit Z). As Plaintiffs noted at the outset of the present action, the purported finding that the in-state producers would have the General Assembly make was a sham right on its face.[41] Indeed, the Revenue Department's liaison with the General Assembly cannot even recall any study performed with respect to the cost of administering out-of-state beverages or how that cost compares to regulating in-state beverages. Lenihan Dep. at 177; *see also id.* at 197-98 (no knowledge of any study of the costs or benefits of the Pre-1985 Statute preferential tax system). The purported finding was an attempt by the in-state

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[41] Plaintiffs made this point right in their Complaint:

> The finding and determination was a sham intended solely to obscure the purpose behind the modified import approach 1985 statute, which was designed to continue to discriminate against alcohol beverages produced outside the State of Georgia and to provide a competitive advantage to Georgia producers.
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> 128
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> By way of example, imported alcohol beverages are by definition *never manufactured* in the State of Georgia. On the other hand, alcohol beverages produced within the State of Georgia are by definition *always manufactured* in the State of Georgia. The cost of regulating and administering the *manufacture* of alcohol beverages therefore can *never* be greater for imported alcohol beverages than it is for alcohol beverages produced within the State of Georgia.

Complaint (No. E-3793) §§ 127 & 128 (emphasis original).

producers to use the United States Supreme Court's compensatory tax doctrine in the Commerce Clause jurisprudence to justify placing a discriminatory double tax on out-state products.

The whole idea was preposterous. *First*, as noted, because in-state products are manufactured within Georgia, it actually costs more to administer in-state product than it does to administer out-state product. *Second*, the renamed "import tax" would generate revenues for Georgia of approximately $17.5 million and $9.1 million, respectively, each and every year. *See* Plaintiffs' Proffered Exhibits X & Y. There was simply never any way that the State of Georgia was ever going to be able to carry its burden of demonstrating under strictest judicial scrutiny that a tax generating some $26.6 million annually was merely "compensatory" of the supposedly increased cost of administering out-of-state product. *Third*, the evidence of increased administrative costs, as actually developed in the legislative history and not the phoney finding, was the Revenue Department's cost estimate along the lines of $75,000 and $20,000 – not $17.5 million and $9.1 million. *Fourth*, these Revenue Department figures had nothing to do with the comparative cost of administering out-of-state product generally, but rather with the administrative cost of implementing new paperwork in order better to disguise the whole subterfuge of renaming the old tax as an import tax. *Fifth*, even putting aside the huge discrepancy in the two sets of numbers ($17.5 million and $9.1 million versus $75,000 and $20,000), if out-of-state product was to be stuck with the cost of paying for (*i.e.*,

"compensating" for) an elaborate disguise of this subterfuge, it would be a very strange application of the compensatory tax doctrine indeed. *Finally*, ironically, Georgia never did incur even the by-contrast paltry costs of $75,000 and $20,000 in increased administrative costs because it never undertook the paperwork disguise. As it turned out, Georgia just kept using the old paperwork – despite the risk that this failure to cover all tracks would make a successful "constitutional challenge" all the "more evident." *See* Plaintiffs' Proffered Exhibit Y, at 2.

Contrary to Defendants' evidentiary submissions of the administrative and regulatory cost information assertedly before the General Assembly and with which the General Assembly was assertedly familiar at the time it enacted the 1985 Statute, Plaintiffs' evidentiary submissions demonstrate that it was, not Mr. Oliver's 1997 cost analysis or anything like it that was before the General Assembly, but rather (now deceased) Director Vaughn's cost analysis that was before the Assembly. The legislators referred to it as "information" or "the financial statement from the department of revenue." *E.g.*, First Transcript at 26; Second Transcript at 1. As noted, Director Vaughn submitted this information ($75,000 for liquor and $20,000 for wine) in opposition to the import approach, and to show, not that the out-of-state product was more expensive to regulate, but that the import approach itself would drive up regulatory costs. In any event, though the legislators had many occasions to rely upon other parts of Director Vaughn's analysis, *see* First Transcript at 8, 12, 25, 26; Second Transcript at 1, 8, they

never once even referred to regulatory costs – not Director Vaughn's cost information nor any other cost information. Their sole concern was to preserve "the preferential tax break," *see* Second Transcript at 4; to "continue[ ] to provide the same favorable treatment as the law that's on the books now."[42] *See* Third Transcript at 13. Of course, "the law that [was then] on the books" whose "favorable treatment" of in-state products the Legislature sought to "continue[ ] to provide" is the same law that has since been adjudged unconstitutional by both the Georgia Supreme Court and the United States Supreme Court on account of its favorable and protectionist treatment of in-state products. *See James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991).

The only question was whether the tax break could be maintained by renaming the second half of the tax and calling it an import tax: "Is it further true that the import tax, the new tax added, is just a new tax not called an excise tax, but an import tax, to maintain that base of income that we presently have from the alcohol?" *See* First Transcript at 16. A proponent of the import

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[42] *See also, e.g.*, First Transcript at 4 ("The import tax obviously would not apply to domestically produced products, and this would gain the additional $.50 *and yet maintain the position that our distilleries in the State of Georgia have on a $.50 break*" (emphasis supplied)); Second Transcript at 8 ("if the Crosby amendment [proposing equalization instead of the import approach] is adopted, is it not true that domestically produced distilled spirits and alcohol will be taxed for all practical purposes at twice the rate it's presently being taxed?").

approach characterized the bill as an effort, using "verbiage," to "shore up" "the existing law that has been in effect in this state since 1937." *See* Second Transcript at 4. Another legislator, more honest, called it "a ***PHONEY*** *new import tax* called a different name." *See* First Transcript at 16 (emphasis supplied).[43]

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[43] Plaintiffs have made the foregoing evidentiary showing in order to show that Defendants have failed to establish the absence of a genuine or substantial issue of fact. In making this showing, Plaintiffs have sometimes referred to certain proffered exhibits. These are exhibits already in the record in this case. Plaintiffs have referred to them for the purpose of making a proffer, which they are required to do. Where counsel asserts that evidence has been wrongfully excluded, in order to preserve any objection to the court's ruling, the complaining party must make an offer of proof showing that the excluded evidence is material, relevant, and beneficial. *Wilson v. State*, 167 Ga. App. 26, 306 S.E.2d 34, 35 (1983); *Stephen W. Brown Radiology Assoc. v. Gowers*, 157 Ga. App. 770, 278 S.E.2d 653, 665 (1981). Furthermore, it is the general rule that, where an offer of proof is necessary, it is error for the trial court to refuse counsel the opportunity to make such an offer. *Jones v. Livingston*, 203 Ga. App. 99, 416 S.E.2d 142, 146 (1992); *Hendrix v. Byers Bldg. Supply, Inc.*, 167 Ga. App. 878, 307 S.E.2d. 759, 761 (1983); *Stephen W. Brown*, 278 S.E.2d at 665 (1981). Requiring counsel to make an offer of proof enables both the trial court and the appellate court to " 'know whether . . . the evidence really exists.' " *Wilson*, 306 S.E.2d at 35 (quoting *Byrd v. State*, 78 Ga. App. 824, 831, 52 S.E.2d 330 (1949), alteration original). In accordance with the Court's July 1995 Order, Plaintiffs do not use these exhibits, but make here a proffer of them. All of the genuine issues of fact are well demonstrated, however, by the other evidentiary submissions (not involving proffered exhibits) that Plaintiffs are making.

3. Defendants Have Failed Even to Address Genuine Issues under Plaintiffs' Other Interstate Commerce Claims, Their Foreign Commerce Claims, and Their Import Export Claims

The above discussion of Defendants' evidentiary materials also shows that Defendants have failed to

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Plaintiffs also take this occasion to move for the admission of, and for reconsideration of the suppression of, the proffered exhibits, on several grounds. *First*, at the time of the July 1995 suppression of these documents, Defendants were still withholding the documents concerning the 1985 legislative session that, in turn, showed how the suppressed documents had been used on the floor of the Georgia House. As a consequence, Plaintiffs did not know these facts and could not present these facts to the Court at the time of the July 1995 ruling. *Second*, the 1985 legislative session now shows that the suppressed documents were, by their nature, not entitled to the various kinds of privilege or other kinds of protection asserted by Defendants at the time. To take one example of many, the 1985 legislative session now demonstrates that Exhibit M (a memo by Divine and Busbee, who have never been parties to this litigation or represented the parties to this litigation) was not work product, but rather a "position paper," *see* First Transcript at 17. *Third*, the very wide and public circulation of and use to which the suppressed documents were put and intended to be put, as now demonstrated the 1985 legislative session, raise the further question whether these documents are entitled to confidentiality and were ever intended to be confidential. *Fourth*, putting to one side the question whether attorney-client privilege can be waived, there never was a ruling whether any of the other forms of protection at issue at the time of the July 1995 ruling can be waived. Most of the suppressed documents were suppressed on the ground of protections other than attorney-client privilege (that is, 1. on the

submit any evidentiary material concerning numerous of Plaintiffs' remaining claims. Defendants have failed to

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basis of the work product doctrine, not an absolute privilege, but which, by definition, allows for disclosure of the contents of documents under certain circumstances, *see* O.C.G.A. § 9-11-26(b)(3) ("Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative" upon certain showings) and 2. on the basis of "*Secrets* of state," *see* O.C.G.A. § 24-9-21(4) (emphsis supplied), which by its very nomenclature only involves actual "secrets"). Even assuming these documents were ever of the kind eligible for such other protections, the new revelations concerning their widespread circulation and public use now raise the issue whether these other forms of protection have been waived.

Indeed, Defendants now submit evidence on what information was assertedly available to the General Assembly when it enacted the 1985 Statute. *See, e.g.*, Lenihan Aff. (No. E-3793) ¶ 5 ("During 1985, there was ample information available to the General Assembly to support the General Assembly's findings and conclusions in the 1985 changes to O.C.G.A. § 3-4-60, including information available to the General Assembly from the Department of Revenue, from other State departments and agencies, and from other sources. *The General Assembly often obtains information regarding proposed legislation from multiple sources, including both governmental and non-governmental sources*" (emphasis supplied)); *see also* Collins Aff. (No. E-3793) ¶ 15 (testimony of the General Assembly's being "knowledgeable and familiar with the costs each year of enforcing and administering the laws which it enacts, including the laws pertaining to alcoholic beverages"). The Defendants' submission of this testimony while at the same time soliciting this Court's aid in suppressing the information that was *in fact* before the General Assembly and widely disseminated in public fora leads to only the most cynical world view of constitutional government.

show the absence of genuine issues of fact under, and have failed even to address in any manner, Plaintiffs' nexus claims, their potential multiple taxation claims, their actual multiple taxation claims, and their tax-to-cost relation claims under the dormant Interstate Commerce Clause. Even in the absence of any such showing by Defendants, Plaintiffs have submitted evidentiary materials showing genuine issues of fact under these claims. *See* Fisher Affidavit ¶ 4; Schwam Affidavit ¶ 4; Guttag Affidavit ¶ 4; Thorpe Affidavit ¶ 4; Kinch Affidavit ¶ 4; Affidavit of John L. Taylor, Jr.; Affidavit of Max Hess. Similarly, Defendants have made no attempt to show the absence of genuine issues of fact with respect to Plaintiffs' claims under the Foreign Commerce Clause or with respect to those under the Import Export Clause. By contrast, Plaintiffs rely upon the above-cited materials to show that such issues do exist and, moreover, submit a decision of the General Agreement on Tariffs and Trade ("GATT") Panel on United States – Measures Affecting Alcoholic and Malt Beverages (Mar. 16, 1992) to show further genuine issues of fact with respect to whether Georgia's double taxation of out-of-state product interferes with the "Nation['s ability] to run [its] foreign polic[y]," *Japan Line*, 441 U.S. at 455, 99 S. Ct. at 1825, and whether it interferes with the " 'Federal Government['s]' " " 'exclusive power' " to " 'speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations,' " *Washington Stevedoring*, 435 U.S. at 760, 98 S. Ct. at 1404 ((quoting *Michelin*, 423 U.S. at 285-86, 96 S. Ct. at 540-41)). *See* Tab 16. In particular, the Panel decision (which only dealt with measures affecting malt beverages

and wine) specifically condemns the 1985 Statute's double taxation, as it applies to out-of-state wine, as a violation of the GATT.[44]

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[44] The Panel decision found in part:

> 5.20 The Panel next examined the claim by Canada that the lower excise tax rate or the tax exemption provided by the states of Alabama, Georgia, Iowa, Nebraska and New Mexico to wine based upon the in-state or domestic origin of the product was contrary to Articles III:1 and III:2. The Panel recalled the United States arguments that the lower excise tax rates and tax exemptions in the states of Alabama, Georgia, Nebraska and New Mexico were allowable as subsidies under Article III:8(b), and that the state of Iowa applied the same tax rate to wine from all sources sold at wholesale. For the same reasons as those enunciated with respect to the federal excise tax on beer, the Panel found that the *application of differential state excise tax rates* in the states of Alabama, *Georgia*, Iowa, Nebraska and New Mexico based upon the origin of the wine, which ***discriminates*** *against imported wine in favour of the domestic like product* is inconsistent with Article III:2, first sentence. Also, for the same reasons enunciated earlier, the Panel found that the state tax measures in issue are not allowable as subsidies under Article III:8(b).

Tab 16, at 75 (emphasis in part supplied and in part omitted). The Panel concluded that

> (e) the provision by the states of Alabama, Georgia, Nebraska and New Mexico of lower excise tax rates on wine based upon its in-state or domestic origin, which lower rates are not available to imported wine, is inconsistent with Article III:2, first sentence, and is not covered by Article III:8(b).

K. Wholly Apart from Other Disputes, Defendants Have Not Disputed Plaintiffs' Rights to Seek Declaratory and Injunctive Relief

Finally, Defendants challenge Plaintiffs' right even to assert the substantive claims discussed above. *See* Defendants' Brief at 47-67. It is true that Plaintiffs have asserted numerous rights of action to support their substantive claims, but it should also be clear from Defendants' briefing why Plaintiffs have had to take this approach. Defendants make a daisy chain of argumentation. They argue that a certain right of action might have been available, but that it should be regarded as unavailable because some other right of action is available. But that other right of action, as it turns out, is always unavailable as well in Defendants' view. Reversing the order in which Defendants make these contentions should make the pattern apparent. For instance, Defendants argue that Plaintiffs are not entitled to a right of action premised upon the United States Constitution (omitting to make any mention of Plaintiffs' right of action premised upon the Georgia Constitution) because, according to Defendants, Plaintiffs have a right of action under 42 U.S.C. § 1983. *See* Defendants Brief at 62-63. Elsewhere, however, Defendants argue that Plaintiffs are not entitled to a right of action under 42 U.S.C. § 1983 because, according to Defendants, Plaintiffs have a right

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Id. at 99. After initially defending Georgia's discriminatory practices before the Panel, once the adverse decision was rendered, the United States, through its Ambassador Rufus Yerxa, decided not to oppose formal adoption of the Panel's report.

of action available to them under Georgia law. *See id.* at 59-61. In anticipation of this contention, Plaintiffs asserted numerous state law rights of action as well. Plaintiffs asserted a right to a refund with interest under O.C.G.A. § 48-2-35, *see, e.g.*, Complaint (No. 3793) ¶¶ 158, 162, 166, 170, 174, 178, 182, 186 & 190, and they asserted a right to a refund with interest under O.C.G.A. §§ 3-2-13 & 3-2-14, *see, e.g.*, Complaint (No. 25073) ¶¶ 152, 156, 160, 164, 168, 172, 176, 180 & 184. Plaintiffs asserted numerous other state law rights of action as well. *See* Plaintiffs' Verified First Amendment to Complaint (No. E-3793) ¶¶ 216 & 217; Complaint (No. 25073) ¶¶ 185 & 186. Defendants now also contend that all of these state law theories of recovery are likewise unavailable. *See* Defendants Brief at 58, 64-66. If all of these state law rights of action are unavailable, which Plaintiffs dispute, Plaintiffs rely in the alternative once again upon their Federal law rights of action. *See* 42 U.S.C. § 1983; *McKesson Corp. v. Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990); *Reich v. Collins*, ___ U.S. ___, 115 S. Ct. 547 (1994).[45]

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[45] Defendants additionally claim that Plaintiffs may not recover interest because, according to Defendants, Plaintiffs have waived their right to interest. *See* Defendants' Brief at 66-67. Plaintiffs note that they sought and are seeking a refund pursuant to O.C.G.A. § 48-2-35 and that this Section provided:

> (a) A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded **interest on the amount of the taxes or fees at the rate of 9 percent** per annum from the the date of payment of the tax or fee to the commissioner.

Finally, Defendants have failed to address yet other rights of action Plaintiffs have asserted to support the substantive claims addressed above: claims for declaratory relief and injunctive relief. *See* Verified Second Amendment to Complaint (No. 3793) ¶¶ 226-231; Verified First Amendment to Complaint (No. 25073) ¶¶ 195-200.

O.C.G.A. § 48-2-35(a) (emphasis supplied). And Plaintiffs did cite to this Section of the O.C.G.A. in their administrative claims. Further, Defendants appear to be attempting to create a new procedural bar midcourse and to apply it retroactively to events occurring prior to the commencement of this litigation and at which time the procedural requirement being created now did not exist. When Defendants attempted to create a virtually identical so-called "contemporaneous protest requirement" under this same Section of the O.C.G.A., the United States Supreme Court rejected the attempt as a direct violation of the Due Process Clause of the Fourteenth Amendment. *See Reich*, 115 S. Ct. at 551.

APPENDIX R

April 2, 1998

BY HAND DELIVERY

The Honorable Alford J. Dempsey, Jr.
T7955 Justice Center Tower
185 Central Avenue, S.W.
Atlanta, Georgia 30303-3643

Re: *Age International, Inc., et al., v. State of Georgia, et al.*, Civil Action File No. E-3793 (Fulton Superior Court)

Age International, Inc., et al., v. State of Georgia, et al., Civil Action File No. E-25073 (Fulton Superior Court)

Dear Judge Dempsey:

At the conclusion of the March 19, 1998 oral argument in the above cases, you requested that the parties submit proposed orders in disk format using WordPerfect 6.1. Pursuant to your request, we are enclosing on behalf of Plaintiffs a proposed order both in disk format and in hard copy.

At oral argument, the Court seemed particularly interested in the intersection of the Commerce Clause and the Twenty-First Amendment. For that reason, we have enclosed copies of three additional cases, besides those already cited, that deal with this issue: *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129 (Fla. 1989); *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994); and *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950 (Ind. App. 1996). Discussion of all three cases has likewise been included in the enclosed proposed order.

The decision of the Supreme Court of Florida in the *Ivey* case is of particular interest because that court was considering a Florida statute specifically modeled after, and indeed identical in its key features to, the 1985 Statute at issue in the instant case. In *Ivey*, the Florida Supreme Court gave explicit consideration to the Georgia Supreme Court's *Heublein* decision and concluded that that decision was limited and distinguishable because the taxpayer in that case had "conceded" away certain issues and challenges.

The Florida Supreme Court went on to consider the merits of the import approach that Florida had borrowed from Georgia's 1985 Statute and concluded that the import approach is "clearly discriminatory" and in violation of the Commerce Clause, notwithstanding the Twenty-First Amendment: "we do not believe that twenty-first amendment concerns are sufficiently implicated to allow this clearly discriminatory tax scheme to stand." *Ivey*, 541 So. 2d at 1140.

APPENDIX S

April 10, 1998

BY HAND DELIVERY

The Honorable Alford J. Dempsey, Jr.
T7955 Justice Center Tower
185 Central Avenue, S.W.
Atlanta, Georgia 30303-3643

Re: *Age International, Inc., et al., v. State of Georgia, et al.*, Civil Action File No. E-3793 (Fulton Superior Court)

Age International, Inc., et al., v. State of Georgia, et al., Civil Action File No. E-25073 (Fulton Superior Court)

Dear Judge Dempsey:

On April 7, 1998, Defendants submitted an additional letter brief, after the parties had submitted their proposed orders. Plaintiffs request an opportunity to respond to Defendants' April 7, 1998 letter brief.

Defendants concede that the Florida statute at issue in *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129 (Fla. 1989), was modeled upon the Georgia 1985 Statute – albeit, in their words, only "partially" so modeled.[1] In an apparent

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[1] The Florida Supreme Court itself in the *Ivey* case stated that the "tax scheme at issue was modeled after Georgia's import tax on alcoholic beverages," *Ivey*, 541 So. 2d at 1137, without any modifier such as *partial* and, further, cited legislative history to demonstrate that the Florida statute was so modeled, *see id.* at 1137 & n.5.

Moreover, in all key characteristics, the Florida statute was indeed the same as the Georgia 1985 Statute. Both statutes

retreat from their defense of the 1985 Statute thus far (which involved a reimbursement rationale because of the allegedly greater cost of regulating and administering out-of-state beverages), Defendants now take the position that the 1985 Statute is distinguishable from the unconstitutional Florida statute because the purposes for the Florida statute "did not include the promotion of temperance nor the aid of the State's police power." Defendants' April 7 Letter at 1. This statement may reflect a too narrow understanding of the Florida statute; the Florida Supreme Court recited that the Florida Legislature had also found and determined to impose the so-called import tax " 'in order to protect the health, safety, welfare, and economic integrity of the state.' " *See Ivey*, 541

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provided for an excise tax on all beverages whether of in-state origin or out-of-state origin. Both statutes went on to impose an additional so-called "import tax" solely upon beverages of out-of-state origin. *See id.* at 1132-34. Further, just as in the case of the Georgia 1985 Statute, the Florida Legislature made a finding and determination in the legislative history that " 'the costs of regulating and administering such imported alcoholic beverages are greater than for those alcoholic beverages not imported.' " *See id.* at 1132 (quoting legislative history).

This is the "premise" that the Florida Supreme Court held to be "erroneous":

> Further, the premise that the costs of regulating and administering imported alcoholic beverages are greater than those for domestic alcoholic beverages is erroneous. It is clear from the record that it actually costs less on a per gallon basis to regulate and administer imported alcoholic beverages than it does to regulate and administer alcoholic beverages manufactured in-state.

Id. at 1138.

So. 2d at 1132 (quoting legislative history). This statement clearly encompassed what Defendants herein call a "police power" rationale and may well have encompassed what Defendants call a "temperance" rationale as well. In any event, the Florida Supreme Court's extensive consideration of the so-called import approach under the Commerce Clause and the Twenty-First Amendment to differential taxation based upon the in-state or out-of-state origin of alcoholic beverages and that court's decisive rejection of the import approach as "clearly discriminatory" and therefore unconstitutional cannot be so readily dismissed on this basis.

If Defendants have shifted to a temperance and police power defense of the 1985 Statute, it should be noted that such a defense has proven unavailing in other cases. For instance, in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994), the State of Texas launched a similar defense:

> Defendants' purported justifications are unpersuasive and insufficient to defend the State's arbitrary treatment of non-Texans. The State contends first that its distribution system was established "to protect the health, safety, welfare, morals and temperance" of its citizens. Tex. Alco. Bev. Code Ann. § 1.03 (West 1978) (articulating these as the policy goals underlying the Texas Liquor Control Act). ***Such boilerplate enabling language hardly explains*** the State's particular restrictions on out-of-state ownership of various liquor licenses.

Cooper, 11 F.3d at 554 (emphasis supplied).

Moreover, Plaintiffs have submitted considerable evidence to demonstrate that an important effect of the double taxation imposed by the import-approach 1985 Statute is to create a substantial price reduction, or price break, for in-state beverages when they are offered for sale to Georgia consumers at the retail level. Under similar circumstances, the court in *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950 (Ind. App. 1996), observed that an argument based upon temperance "would seem to be at odds with the undisputed 'core concern' of promoting temperance, since *by seeking lower prices for its citizens a State would presumably be taking steps toward increased, rather than decreased, consumption.*" *Indiana Wholesale*, 662 N.E.2d at 967 n.29 (emphasis supplied). Indeed, even without a price break to the consumer, the temperance rationale is unavailing:

> With respect to the promotion of temperance, however, the *Loretto Winery* opinion demonstrates quite persuasively that temperance is unlikely to be promoted by regulations which discriminate between in-state and out-of-state economic interests. In *Loretto Winery*, the court struck down New York's attempt to permit "wine products" containing New York grapes to be sold in grocery stores, while restricting sales of identical "wine products" with out-of-state grapes to package liquor stores. Rejecting the State's claim that a temperance goal was furthered by the regulation, the court aptly stated: "The drinkers will become just as drunk on [wine products] whether the grapes come from New York, California, or any of the six or so other states which produce wine grapes".

Id. 662 N.E.2d at 969 n.34 (quoting *Loretto Winery Ltd. v. Gazara*, 601 F. Supp. 850, 863 (S.D.N.Y.), *modified on other grounds*, 761 F.2d 140 (2d Cir. 1985); alteration in the *Indiana Wholesale* original).

Further, there is guidance from the United States Supreme Court specifically with reference to how a purpose challenge should be adjudicated generally and in particular when the State defends with a temperance rationale under the Twenty-First Amendment. In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720 (1987), the State of New York defended the challenged state statute as "further[ing] the State's interest in promoting temperance." *Duffy*, 479 U.S. at 351, 107 S. Ct. at 729. The effect of the state statute at issue there was to increase the number of retail outlets for liquor. The *Duffy* Court, echoing similar considerations set out above by the *Indiana Wholesale* and *Loretto Winery* courts, noted:

> One would hardly suggest that the New York Legislature set out to promote temperance by increasing the number of retail outlets for liquor.

Duffy, 479 U.S. at 351, 107 S. Ct. at 729. Nevertheless, the *Duffy* Court declined to "reach the question whether New York's liquor-pricing system could be upheld as a exercise of the State's power to promote temperance." 479 U.S. at 351-52, 107 S. Ct. at 729-30. Even though it did not reach this question, the Court did hold that the challenged statute was in violation of the Commerce Clause, notwithstanding New York's invocation of the Twenty-First Amendment. *See* 479 U.S. at 352, 107 S. Ct. at 730.

The reasons for which the *Duffy* Court declined to reach this question are instructive in the present case. The

case came to the United States Supreme Court from the New York State court system, not from the lower Federal courts, and the United States Supreme Court observed that the New York courts "did not find that the statute ***was intended*** to promote temperance, or ***that it does so***." 479 U.S. at 351, 107 S. Ct. 729 (emphasis supplied). In the absence of such "factual findings of the state courts," and for another reason to be discussed below, the United States Supreme Court declined to reach the issue. *See* 479 U.S. at 351-52, 107 S. Ct. at 729-30.

This statement by the United States Supreme Court appears to authorize, and indeed to require, two kinds of judicial inquiries. First, it requires a judicial inquiry into the legislative intent. Second, it requires a judicial inquiry into whether the actual effect of the challenged statute in fact "does" promote the intended purpose.

Moreover, the United States Supreme Court undertook a review, of its own, of the legislative history bearing upon this question. The Court observed that the New York State legislative history of the challenged statute, in its recitals, stated that the statute had been "enacted 'for the purpose of fostering and promoting temperance.' " 479 U.S. at 351 n.13, 107 S. Ct. at 729 n.13 (quoting legislative history). Nevertheless, this bare "statement" was, the Court observed, "not supported by specific findings, or by evidence in the record." *Id.* The Court went on to review more legislative history in order to demonstrate this lack of support either by specific findings or by other evidence:

> The legislative Report accompanying § 101-bb does not suggest that the amendment was aimed at decreasing consumption. Rather, the Report

> focuses on the need to protect small retailers. New York State Legislature, Senate Excise Committee, Final Report 30, 37 (Mar. 1971). The Report does express concern over the increase in liquor consumption during the years between 1964 and 1971. *Id.*, at 16. But the Report recognizes the Moreland Commission's finding that higher prices do not reduce consumption, and states that "because of the multiplicity of factors involved and lack of data on specifics, the Committee is unable to determine what portion of such increase is attributable to any particular factors." *Id.*, at 14.

Duffy, 479 U.S. at 351 n.13, 107 S. Ct. at 729 n.13; *see also* 479 U.S. at 351, 107 S. Ct. at 729 (reviewing additional legislative history, the findings of the Moreland Commission). After conducting this review of New York State legislative history ("Our review of the record") and having found no factual findings therein to support New York State's Twenty-First Amendment temperance assertion, the United States Supreme Court declined to reach the issue. 479 U.S. at 351-52, 107 S. Ct. at 729-30. Nevertheless, the Court struck down the statute as unconstitutional, explicitly notwithstanding the Twenty-First Amendment. *See* 479 U.S. at 352, 107 S. Ct. at 730.

The *Duffy* Court's approach is instructive for the instant case in several ways. It shows that a judicial inquiry into legislative intent as a factual matter, including a review of legislative history, is both authorized and required. Further, it shows that judicial inquiry into the actual effect as a factual matter and whether it satisfies the intent or purpose as a factual matter is likewise both

authorized and required. Finally, it demonstrates the factual nature of all of these issues and leads ineluctably to the conclusion that they cannot be resolved on purely legal grounds on motion for summary judgment.

Defendants also seek to distinguish the Florida *Ivey* litigation with the observation that Florida "apparently" waived what Defendants call "the evidentiary bar" to a challenge to purpose. *See* Defendants' April 7 Letter at 1. Of course, Plaintiffs dispute whether there is any such so-called evidentiary bar in a case involving claims based upon the Commerce Clause, not to mention the Equal Protection Clause, and the State's Twenty-First Amendment defense thereto. The *Duffy* case, as well as all the other case law support cited by Plaintiffs in previous briefing and in their proposed order, demonstrate that there is no such bar. As previously noted, the Georgia Supreme Court itself examined purpose evidence in the record when striking down the Pre-1985 Statute. *See James B. Beam Distilling Co. v. State*, 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) ("The *record demonstrates that the purpose* and effect of the statute was economic protectionism" (emphasis supplied)) (subsequent history omitted). Indeed, a fair interpretation of the Georgia Supreme Court's 1987 decision in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987), is that the challenge made therein failed precisely because the taxpayer in that case failed to challenge purpose. *Accord Ivey*, 541 So. 2d at 1137 ("unlike the plaintiffs in the instant case, the plaintiffs in *Heublein* did not challenge the Georgia general assembly's stated purpose for the import tax. They simply conceded the existence of

twenty-first amendment concerns and argued that whatever the underlying purpose, ' "it doesn't fly in light of the Commerce Clause" ' " (citation omitted)). Moreover, it would not seem to be a sufficient basis for asserting the availability of such a so-called evidentiary bar and for asserting Florida's waiver thereof in the *Ivey* litigation by simply stating that it was "apparently" so.

Finally, the *Ivey* litigation involved, on the question of purpose, two kinds of challenges – as does the instant case. First, the *Ivey* litigation involved a direct challenge to purpose. Second, the *Ivey* litigation also challenged purpose by showing that the actual effect did not satisfy the stated purpose. The Florida Supreme Court struck down Florida's import-approach statute on both grounds. Thus, even if there was a so-called evidentiary bar to a direct challenge to purpose and even if Florida did waive such a bar as posited by Defendants, it would do nothing to diminish the Florida Supreme Court's holding with respect to the second kind of challenge to purpose.

Finally, Defendants would distinguish the *Ivey* litigation with a factual negative; they contend that there was "no indication" that the Florida alcohol industry situation was the same as the Georgia alcohol industry situation and no indication that, whereas the cost of regulating and administering beverages of out-of-state origin was found to be not only not greater than "on a per gallon basis," but "*actually* . . . *less* on a per gallon basis . . . than it does to regulate and administer alcoholic beverages manufactured in state," 541 So. 2d at 1138 (emphasis supplied), such costs might or are greater in the Georgia situation.

Wholly apart from the hypothetical and indeed speculative "no indication" nature of this assertion by Defendants, these are obviously factual questions that cannot be resolved as a purely legal matter on motion for summary judgment. Moreover, Defendants inaccurately describe their evidence on this issue as "uncontradicted," *see* Defendants' April 7 Letter at 1, entirely ignoring the substantial evidentiary challenge Plaintiffs have made on this issue. *See, e.g.*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 64-90. Indeed, as noted, Defendants' evidence on this issue is in the form of opinion testimony, which "is incapable of piercing an essential element" of Plaintiffs' claims, much less carrying Defendants' burden of justifying discrimination under strict scrutiny. *American Cyanamid Co. v. Allrid*, 176 Ga. App. 831, 832, 338 S.E.2d 14, 15 (1985); *see also Ginn v. Morgan*, 225 Ga. 192, 194, 167 S.E.2d 393, 395 (1969); *Savannah Valley Prod. Credit Ass'n v. Cheek*, 248 Ga. 745, 295 S.E.2d 689 (1982).

Defendants also seek in their April 7 letter to capitalize on a subtle difference of interpretation as between the *Cooper* case and the *Indiana Wholesale* case. One would do well to explain this difference of interpretation because, properly understood, it can give no comfort to Defendants and their position in the instant case. Both the *Cooper* court and the *Indiana Wholesale* court are interpreting a decision of the United States Supreme Court in *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 109 S. Ct. 2491 (1989). In *Healy*, the four-Justice plurality struck down a Connecticut alcoholic beverages statute under two independent Commerce Clause claims or theories: The Connecticut statute was unconstitutional 1) as a so-called

direct regulation of interstate commerce, *see* 491 U.S. at 331-40, 109 S. Ct. at 2496-2501, and 2) as discriminatory against interstate commerce, *see* 491 U.S. at 340-41, 109 S. Ct. at 2501-02. Justice Scalia concurred only as to the second ground of Commerce Clause invalidation (discrimination) and, when addressing the interplay of the Twenty-First Amendment and the Commerce Clause on such a claim, stated: "This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character ***eliminates the immunity afforded by the Twenty-First Amendment.***" *Healy*, 491 U.S. at 344, 109 S. Ct. at 2504 (Scalia, J., concurring) (emphasis supplied).

The *Cooper* court relied upon Justice Scalia's statement to conclude that the "core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause." *Cooper*, 11 F. 3d at 555. The *Indiana Wholesale* court, by contrast, would apply an alternative test in the case of core concerns by requiring the State to demonstrate that the actual effect of the challenged statute "in fact advanc[es] a 'core concern' [and] is 'necessary' to the furtherance of the 'core concern.' " *Indiana Wholesale*, 662 N.E.2d at 969 (citation and footnote omitted).

Applied to the present case, these authorities result in the following approach. As to Plaintiffs' nexus, multiple taxation, and tax-to-cost relation claims (what the *Healy* case and other cases sometimes call a direct regulation challenge), there is no dispute among any of these authorities that the Twenty-First Amendment is totally unavailing. *See Healy*, 491 U.S. at 334-35, 109 S. Ct. at 2498

(plurality opinion) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 585, 106 S. Ct. 2080, 2088 (1986) (holding supported by five Justices)). As to Plaintiffs' discrimination challenges, the Twenty-First Amendment is either totally unavailing (under the authority of *Cooper* and the Scalia concurrence in *Healy*) or, assuming Defendants can successfully demonstrate a so-called core concern (which Plaintiffs vigorously dispute), there should be a further test requiring Defendants to approve as a factual matter that the 1985 Statute in fact advances this core concern and is necessary to the furtherance of this core concern (under the authority of the *Indiana Wholesale*).

In sum, the above discussion demonstrates that Defendants' invocation of the Twenty-First Amendment is totally unavailing as respects Plaintiffs' nexus, multiple taxation, and tax-to-cost relation claims and that summary judgment must be denied on this basis as to these claims. Further, as to Plaintiffs' discrimination claims, even under the *Indiana Wholesale* test, there are genuine issues of disputed fact that prevent resolution of these claims purely as a matter of law on this summary judgment motion. Accordingly, summary judgment as to these claims must be denied as well.

Finally, nothing in Defendants' April 7 Letter addresses the second and independent discrimination challenge made by Plaintiffs – to the requirement of the 1985 Statute that producers use "Georgia grown products" in order to qualify for the preferential tax treatment while imposing adverse double taxation on all those producers, and their goods, who use agricultural products of out-of-state origin. *See* Ga. L. 1985 at p. 665, § 2, *codified at*

O.C.G.A. § 3-4-60(3). Such a requirement has been held to constitute an independent violation of the Commerce Clause:

> Defendants' reliance upon the case of *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981) is misplaced. . . . There the State of Minnesota, to protect the environment and preserve solid waste disposal sites, prohibited the retail sale of milk in plastic non-returnable, non-refillable containers. At the same time, however, non-returnable, non-refillable containers were permitted to be utilized for products other than milk. *Id.* at 458, 101 S. Ct. at 721. The Court, in upholding the statute's validity under the commerce clause, found that the statute regulated evenhandedly by prohibiting sales of *all* milk sold in plastic, non-returnable containers and that the burden was not based on the origin of the milk. The burden on interstate milk was no greater than that on local milk, and the burden on interstate commerce was at most incidental. *Id.* at 471, 101 S. Ct. at 727. In contrast, the New York ABC Law in effect excludes for sale in retail grocery stores any 6% wine product not produced exclusively from New York grapes. Only those firms that sell wine products from 100% New York grapes may reap the benefits of easier market access allowed by the new legislation. As a result, growers and packagers of foreign grapes are placed at a competitive disadvantage. Persons who might otherwise purchase plaintiff's wine product, sold only at a liquor store, may now purchase an equivalent product containing 100% New York grapes, at the more convenient and more numerous retail grocery stores. Inasmuch as the

> legislation does not regulate the product of local and out-of-state grapes evenhandedly, the decision in *Clover Leaf Creamery* is not applicable to the case at bar.
>
> As a result of this Court's conclusion that the ABC Law is discriminatory not only in its "legislative ends," but also in the means chosen, *see City of Philadelphia, supra*, 437 U.S. at 626, 98 S. Ct. at 2537, it is clear that the normal operation of the interstate Commerce Clause forbids the states from enacting legislation such as this.

Loretto Winery, 601 F. Supp. at 858-59 (citation omitted, emphasis original). Moreover, the New York statute could not be saved by invocation of the Twenty-First Amendment. *See id.* at 859-64.

APPENDIX T

IN THE SUPREME COURT STATE OF GEORGIA

BRIEF OF PLAINTIFFS/APPELLANTS

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I. JURISDICTION

Involving questions of Federal and Georgia constitutional law, as well as treaty obligations under the General Agreement on Trade and Tariffs, appeal is properly taken to this Court. Art. 6, § 6, ¶ 2.

II. JUDGMENT APPEALED AND ENUMERATION OF ERRORS

Plaintiffs appeal from the grant of summary judgment as to all claims in the Final Order (filed May 21, 1998), RI289:1-17(R21453-69),[1] and from the Order (filed July 28, 1995), RI130, Order on Motion to Quash (filed June 17, 1997), RI205, and Order (filed June 17, 1997), RI204, and specify these errors:

1. The Superior Court erred in failing to require Defendants to negate, and in failing to address, Plaintiffs' multiple Interstate Commerce Clause claims.

2. The Superior Court erred in failing to require Defendants to negate, and in failing to address, Plaintiffs' independent challenge to the requirement that producers use "Georgia grown products."

3. The Superior Court erred by refusing to adjudicate Plaintiffs' claims before considering Twenty-First Amendment immunity.

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4. The Superior Court erred by refusing to harmonize the Twenty-First Amendment and the Commerce Clause and by holding, instead, that the declared purpose is determinative and, further, that all legislative history and other evidence is irrelevant.

5. The Superior Court erred by granting Twenty-First Amendment immunity with respect to Plaintiffs' nexus, multiple taxation, and tax-to-cost relation claims and, at a minimum, by granting such immunity to Plaintiffs' discrimination claims without requiring Defendants to prove that the 1985 Statute advances a core concern and is necessary to the furtherance of this concern.

6. The Superior Court erred in failing to address Plaintiffs' multiple Foreign Commerce Clause claims.

7. The Superior Court erred in granting Twenty-First Amendment immunity with respect to Plaintiffs' Foreign Commerce Clause claims.

8. The Superior Court erred in failing to require Defendants to negate Plaintiffs' Import-Export Clause claims.

9. The Superior Court erred by applying abandoned case law to reject Plaintiffs' Import-Export Clause claims.

10. The Superior Court erred in striking Plaintiffs' expert testimony.

11. The Superior Court erred in holding that Plaintiffs had not authenticated their evidence.

12. The Superior Court erred by setting up the Twenty-First Amendment as an evidentiary disqualification.

13. The Superior Court erred in suppressing documents produced by Defendants in the *Beam* case.

14. The Superior Court erred in suppressing Plaintiffs' Open Records.

15. The Superior Court erred in holding that the *Heublein* decision barred Plaintiffs' multiple Interstate Commerce Clause claims and their multiple Foreign Commerce Clause claims.

16. The Superior Court's remedial rulings should be vacated as premature.

III. INTRODUCTION

The Plaintiff Out-of-State Suppliers' challenge to the 1985 Statute,[2] and its new "import approach," is framed by three reported decisions – the only decisions to have given any consideration to the soundness of the new import approach: 1) this Court's 1987 decision in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987); 2) this Court's 1989 decision in *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989) (subsequent history omitted); and 3) the Florida Supreme Court's 1989 decision in *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129 (Fla. 1989).

To begin with, some historical background: Until 1984, a minority of States (Hawaii, Georgia, and Florida among them), relying upon *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 57 S. Ct. 77 (1936), and progeny, favored alcoholic beverages produced within

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[2] The 1985 Statute was enacted by an Act entitled Alcoholic Beverages – Excise Taxes on Alcohol, Distilled Spirits, Table Wines, and Dessert Wines, No. 540 (House Bill No. 564), at Ga. L. 1985 at pp. 665-67 and codified at O.C.G.A. §§ 3-4-60 (spirits and alcohol, collectively "liquor") & 3-6-50 (wine).

their borders by imposing lighter taxation on those beverages while imposing heavier taxation on alcoholic beverages produced in the other States. In 1984, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984), the United States Supreme Court struck down Hawaii's preferential taxation for in-state alcoholic beverages as discriminatory against out-of-state beverages and as simple economic protectionism, all in violation of the Interstate Commerce Clause. And the Court did so expressly notwithstanding its earlier *Young's Market* decision and progeny. *See Bacchus*, 468 U.S. at 274 & n.13, 104 S. Ct. at 3056-57 & n.13 ("Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment . . . ," citing *Young's Market*). With the advent of the *Bacchus* decision, the remaining discriminatory taxation against out-of-state beverages in a minority of jurisdictions fell State by State through repeal, attorney general opinion, or court decision – with the exception of two States: Georgia and Florida.

Georgia did repeal its tax statute (sometimes called the "Pre-1985 Statute"), but immediately replaced it with a newly innovated approach called the *import approach*. Under the import approach, the differential tax rates, differentiating between beverages produced in-state and beverages produced out-of-state, would remain the same, but the second half of the tax would be imposed under a newly named "import tax" reserved only for beverages produced out-of-state. Florida, whose pre-*Bacchus* statute was struck down by court decision,[3] looked to Georgia's

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[3] *Division of Alc. Bevs. & Tob. v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988) (subsequent history omitted).

example and enacted a new statute modeled on Georgia's new import approach.

As noted, the instant action is framed to a large extent by three decisions – two from this Court and one from the Florida Supreme Court. In *Heublein*, this Court was confronted with a limited challenge wherein counsel for the plaintiff took the position that

> "we are not sitting here and challenging what the state says their purpose was in adopting this legislation. This is not a factual case. What we are saying is whatever you feel your reason was, it doesn't fly in light of the Commerce Clause."

Heublein, 256 Ga. at 584, 351 S.E.2d at 195-96. In the absence of any factual challenge and, indeed, any challenge to purpose ("the unchallenged purpose"), the Court rendered the following limited holding: "*For this reason*, we ***cannot say*** that the trial court erred in sustaining the constitutional validity of the tax under the Twenty-first Amendment rather than striking it down under the Commerce Clause." *Id.* 256 Ga. at 585, 351 S.E.2d at 196 (all emphasis herein supplied unless otherwise indicated).

After the *Heublein* decision, in the discovery phase of the *Beam* case challenging the Pre-1985 Statute, the State of Georgia produced documents concerning the legislative history of the 1985 Statute that had not been produced or considered by the courts in the *Heublein* challenge. *Relying upon the newly disclosed evidence concerning the enactment of the import approach 1985 Statute*, Fulton Superior found and held that even the purpose and effect of the Pre-1985 Statute were economic protectionism:

> This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history . . . . *The protectionist purpose of the statute is further indicated by the* ***exhibits "A-3"*** **through** ***"A-13"*** produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and *produced to plaintiffs by the defendants pursuant to this Court's Order of December 3, 1987*[ ].

RI113&116:94-98. On appeal, this Court, relying upon this same newly disclosed evidence concerning the legislative history of the 1985 Statute, affirmed that both the purpose and the effect were simple economic protectionism and that the statute was invalid. *James B. Beam Distilling*, 259 Ga. at 364, 382 S.E.2d at 96 ("The *record* demonstrates that the purpose and effect of the statute was economic protectionism"). Thereafter, the United States Supreme Court went further to hold that the purpose and the effect were economic protectionism even in the years immediately preceding the enactment of the 1985 Statute. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991).

In *Ivey*, the Florida Supreme Court considered a tax statute that was specifically "modeled after Georgia's import tax on alcoholic beverages." *Ivey*, 541 So.2d at 1137 & n.5. The Florida defendants, like Defendants herein, urged the Florida Supreme Court to uphold Florida's import approach statute on the basis of the *Heublein* decision. *See Ivey*, 541 So.2d at 1137. The Florida Supreme Court declined to resolve the case on that basis because

of two considerations: 1) because of the limited nature of the holding in *Heublein*, especially in light of the type of challenge made in that case, and 2) because the plaintiffs in the *Ivey* case were bringing a different kind of challenge:

> The tax scheme at issue was modeled after Georgia's import tax on alcoholic beverages which was recently upheld by the Georgia Supreme Court in *Heublein, Inc. v. State, 256 Ga. 578, 351 S.E.2d 190* appeal dismissed, *483 U.S. 1013, 107 S. Ct. 3253, 97 L. Ed. 2d 753 (1987).* In Heublein, the court employed the balancing approach set forth in Bacchus to uphold a discriminatory import tax on distilled spirits and wines, because "the unchallenged purpose of the import tax implicate[d] central concerns of the Twenty-first Amendment, i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors." The import tax which was upheld in Heublein was based on legislative findings similar to those set forth in section 9. However, unlike the plaintiffs in the instant case, the plaintiffs in Heublein did not challenge the Georgia general assembly's stated purpose for the import tax. They simply conceded the existence of the Twenty-first amendment concerns and argued that whatever the underlying purpose, " 'it doesn't fly in light of the Commerce Clause.' "

Id. 541 So. 2d at 1137 (citation and footnotes omitted). The Florida Supreme Court, squarely presented with the challenge that was not made in *Heublein*, went on to consider the merits of the challenge and rejected the import approach as "unconstitutional." *Id.* at 1137-40. Georgia now stands alone both in its imposition of differential

taxation on in-state and out-of-state alcoholic beverages and in its reliance upon the import approach to justify this differential taxation.

For reasons briefed below, *Heublein* is not a bar to this action. There is an additional prudential consideration supporting this conclusion. Plaintiffs' claims, even though they are based in large measure upon the Federal constitution, cannot be heard in Federal court. *See Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484 (N.D. Ga. 1993) (dismissing "on jurisdictional grounds," *id.* at 1502), *aff'd*, 37 F.3d 637 (11th Cir. 1994). It falls of necessity to the courts of the several States to protect and uphold the Federal interests in which they all share. When, as here, the courts of our sister State of Florida have in the *Ivey* litigation relinquished (in deference to the Federal interest in a common market) a policy of their own State that discriminated against Georgia goods, it is incumbent upon the Georgia courts to consider the reasons for this decision and whether they apply to the Georgia policy of discriminating against Florida goods.

IV. PROCEDURAL HISTORY

Defendants moved for summary judgment, apparently as to the entirety of Plaintiffs' actions, but did so without addressing at least two important claims for relief Plaintiffs asserted. In light of the remedial confusion surrounding tax challenges,[4] Plaintiffs sought all

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[4] *See generally Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (subsequent history omitted).

possible remedies, but are most interested in ending discriminatory taxation going forward and are, for this reason, seeking declaratory relief and injunctive relief. *See, e.g.*, RI197:(R8559, *et seq.*). Defendants did not address these claims for relief, and neither did the Superior Court, which adopted Defendants' proposed order virtually without modification.

There is a curious provision in the session laws pertaining to the 1985 Statute. Between repeal of the historic double-taxing Pre-1985 Statute and enactment of the double-taxing 1985 Statute under challenge, there existed for, one day, *an equalized statute*. The United States District Court explained why and how this came about:

> In 1985, the Georgia General Assembly engaged in some legislative acrobatics to retain the essential structure of the taxation system, yet insulate it from the Commerce Clause jurisprudence crystalized in *Bacchus*. On March 31, 1985, the Assembly approved an act which equalized the excise tax on imported and domestic alcoholic beverages. However, the equalized tax had no time to become effective, because the next day the Assembly passed another act, the current version of O.C.G.A. § 3-4-60. This statute reimposed the differential tax on imported alcoholic beverages, although it is phrased slightly differently from the pre-1985 statute . . . . The April 1, 1985 Act contained a non-severability clause which provided that the March 31, 1985 version would be reinstated should the later version ever be held invalid or unconstitutional.

Age, 830 F. Supp. at 1487-88. In other words, if the 1985 Statute is ever even declared unconstitutional, the tax

will automatically become equalized. The unconstitutional economic protectionism would finally come to an end, without the necessity of any further legislative or executive action and without any revenue loss to the State. This is why the District Court dismissed the challenge to the 1985 Statute brought there. The District Judge was confident that Plaintiffs would secure declaratory and injunctive relief in the Georgia courts. *See id.* at 1501.

V. ARGUMENT AND CITATION OF AUTHORITY

A. The Superior Court erred in failing to require Defendants to negate, and in failing to address, Plaintiffs' Multiple Interstate Commerce Clause Claims.

Acutely aware of the *Heublein* decision, Plaintiffs launched a different and much expanded challenge to the 1985 Statute. Under the Interstate Commerce Clause alone (and to some extent under the Due Process Clause as well), Plaintiffs asserted some five claims against the 1985 Statute: 1) a nexus claim, 2) a multiple taxation claim (both actual and potential multiple taxation), 3) a tax-to-cost relation claim, 4) a discriminatory effect claim (both actual and potential discriminatory effect), and 5) a discriminatory purpose claim.[5] The first three are sometimes

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[5] Plaintiffs rely upon these authorities, among others, in making these distinct challenges under the Interstate Commerce Clause and the Due Process Clause: *Bacchus*, 468 U.S. at 270, 104 S. Ct. at 3054-55 ("finding that state legislation constitutes 'economic protectionism' may be made on the basis of ***either*** discriminatory purpose ***or*** discriminatory effect" (citation omitted)); *James B. Beam*, 259 Ga. at 364, 382 S.E.2d at 96 ("record

called "direct regulation" claims. *E.g.*, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573,

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demonstrates that the ***purpose*** and ***effect*** of the statute was economic protectionism"); *Wardair Can., Inc. v. Florida Dep't of Rev.*, 477 U.S. 1, 8, 106 S. Ct. 2369, 2373 (1986) ("[1.] Is the tax applied to an activity with a substantial nexus with the taxing State; [2.] Is the tax fairly apportioned; [3.] Does the tax discriminate against interstate commerce; and [4.] Is the tax fairly related to the services provided by the State"); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S. Ct. 2620, 2623-24 (1984) (either actual or potential effect); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-78, 288 n.15, 97 S. Ct. 1076, 1078, 1084 n.15 (1977) (state tax "must receive the careful scrutiny of the courts" to determine whether "sufficient nexus with the State"); *Miller Bros, Co. v. Maryland*, 347 U.S. 340, 342, 344-45, 74 S. Ct. 535, 537, 539 (1954) (" 'power of a state, even its power of taxation . . . is limited to such as is ***within its jurisdiction***' "; "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (citation omitted)); *Northwestern States Port. Cem. Co. v. Minnesota*, 358 U.S. 450, 464, 79 S. Ct. 357, 366 (1959) (" 'nexus between such a tax and *transactions **within** a state for which the tax is an exaction*' " (citation omitted)); *Norton Co. v. Department of Rev.*, 340 U.S. 534, 537, 539, 71 S. Ct. 377, 380, 381 (1951) ("some local incident [must] occur[] sufficient to bring the transaction within its taxing power"; "shipp[ing]" from one state to customers in another state was "so clearly interstate in character" as to be "not subject to . . . tax"); *Gwin, W. & P., Inc. v. Henneford*, 305 U.S. 434, 439, 59 S. Ct. 325, 327 (1939) (not to tax "activities in such commerce which extend beyond the territorial limits of the taxing state"); *Western Live St. v. Bureau of Rev.*, 303 U.S. 250, 256, 58 S. Ct. 546, 549 (1938) (tax to be limited to "commerce carried *on **within** the taxing state*" and not to "extend[] to the commerce carried on *without the state boundaries*"); *Connecticut Gen. Life Ins. v. Johnson*, 303 U.S. 77, 80-81, 58 S. Ct. 436, 438 (1938) ("due process clause denies to the state power to tax . . . the corporation's property and *activities elsewhere*"); *International Har. Co. v. Evatt*, 329 U.S. 416, 420, 67 S.

579-80, 106 S. Ct. 2080, 2084-85 (1986). Mindful of their duty as nonmovants to come forward with evidence, *see Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991), Plaintiffs submitted voluminous evidence in support of these multiple Interstate Commerce Clause claims. *See, e.g.*, RI220:5-27, 63-117(R11584-606, 11642-96). It should be recalled, especially in a case involving multiple claims and theories, that

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Ct. 444, 446 (1947); *Freeman v. Hewit*, 329 U.S. 249, 253-55, 67 S. Ct. 274, 277-78 (1946) (to tax the interstate act of transporting a product across state border would be to tax "the very process of interstate commerce"); *Michigan-Wis. P.L. Co. v. Calvert*, 347 U.S. 157, 168, 170, 74 S. Ct. 396, 402, 403 (1954) (as good travels interstate, states may not each separately tax as "first taking" exportation of good outside state and as "first unloading" importation of good into state); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330, 64 S. Ct. 1023, 1026 (1944) (tax on in-state sale or in-state use permissible, but "tax on an *interstate sale* . . . involves an assumption of power by a State which the Commerce Clause was meant to end"); *Complete Auto*, 430 U.S. at 278, 288 n.15, 97 S. Ct. at 1078, 1084 n.15 ("must receive the careful scrutiny of the courts" to determine whether "tax is unfairly apportioned"); *Commonwealth Ed. Co. v. Montana*, 453 U.S. 609, 617, 101 S. Ct. 2946, 2953 (1981) ("apportionment *or potential multiple taxation*"); *accord Michigan-Wis.*, 347 U.S. at 166, 74 S. Ct. at 400-01; *Gwin*, 305 U.S. at 439-40, 59 S. Ct. at 327-28; *Western*, 303 U.S. at 255-56, 58 S. Ct. at 548-49; *see also Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444, 100 S. Ct. 1223, 1235 (1980) (alternative showing of potential for duplicative taxation); *Armco*, 467 U.S. at 644, 104 S. Ct. at 2623-24; *Freeman*, 329 U.S. at 256-57, 67 S. Ct. at 278-79; *Complete Auto*, 430 U.S. at 278, 288 n.15, 97 S. Ct. at 1078, 1084 n.15 ("must receive the careful scrutiny of the courts" to determine whether "unrelated to services provided").

> In order to prevail on summary judgment, a defendant must negate at least one essential element under every theory of recovery fairly drawn from the pleadings and the evidence.

Tollman v. Zamani, 224 Ga. App. 518, 519, 481 S.E.2d 232, 233 (1997).[6] The Superior Court erred in granting summary judgment without requiring Defendants to "negate at least one essential element" under each of these claims and, further, without addressing the claims in any way. *Id.*

B. The Superior Court erred in failing to require Defendants to negate, and in failing to address, Plaintiffs' independent challenge to the requirement that producers use "Georgia grown products."

Plaintiffs launched a second and independent discrimination challenge, to the requirement of the 1985 Statute that producers use "Georgia grown products" in order to qualify for the preferential tax treatment while imposing double taxation on all those producers, and their goods, who use agricultural products of out-of-state origin. *See* Ga. L. 1985 at p. 665, § 2, *codified at* O.C.G.A. § 3-4-60(3). Such a requirement has been held to constitute an independent violation of the Commerce Clause:

> Defendants' reliance upon the case of *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed.2d 659 (1981) is misplaced. . . . There the State of Minnesota . . . regulated evenhandedly by prohibiting sales of *all* milk

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> sold in plastic, non-returnable containers and that the burden was not based on the origin of the milk. . . . In contrast, the New York ABC Law in effect excludes for sale in retail grocery stores any 6% wine product not produced exclusively from New York grapes. Only those firms that sell wine products from 100% New York grapes may reap the benefits of easier market access allowed by the new legislation. As a result, growers and packagers of foreign grapes are placed at a competitive disadvantage. Persons who might otherwise purchase plaintiff's wine product, sold only at a liquor store, may now purchase an equivalent product containing 100% New York grapes, at the more convenient and more numerous retail grocery stores. Inasmuch as the legislation does not regulate the product of local and out-of-state grapes evenhandedly, the decision in *Clover Leaf Creamery* is not applicable to the case at bar.

Loretto Winery Ltd. v. Gazara, 601 F. Supp. 850, 858-59 (S.D.N.Y.) (citation omitted), *modified on other grounds*, 761 F.2d 140 (2d Cir. 1985); *see also, e.g., Bacchus*, 468 U.S. at 268-73, 104 S. Ct. at 3053-56[7] (similar content requirement under Hawaii law held to violate Commerce Clause); *McKesson*, 524 So. 2d at 1006-09[8] (similar content

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[7] *Bacchus* noted that, as early as 1876, the Court, in *Welton v. Missouri*, 91 U.S. 275, had "struck down a Missouri statute that 'discriminat[ed] in favor of goods, wares, and merchandise which are the ***growth, product, or manufacture*** of the State.' " 468 U.S. at 271, 104 S. Ct. at 3055 (citation omitted, alteration in *Bacchus* original).

[8] Moreover, neither the New York, Hawaii, nor Florida statute could be saved by invoking the 21st Amendment. *See Loretto*, 601 F. Supp. at 859-64; *Bacchus*, 468 U.S. at 274-76, 104 S. Ct. at 3056-58; *McKesson*, 524 So. 2d at 1009.

requirement under Florida law held to violate both Commerce and Equal Protection Clauses[9]). The Superior Court erred in granting summary judgment on these claims without requiring Defendants to "negate at least one essential element" and, further, without addressing the claims in any way. *Tollman*, 224 Ga. App. at 519, 481 S.E.2d at 233.

C. The Superior Court erred in countermanding *Ivey*, *Capital Cities*, and other decisions by refusing to adjudicate Plaintiffs' claims before considering Twenty-First Amendment immunity.

Florida's *Ivey* litigation concerned a statute specifically "modeled after Georgia's import tax on alcoholic beverages" at issue here. *Ivey*, 541 So. 2d at 1137. After a "hearing," the trial court found that this import approach, borrowed from Georgia, was " 'clearly discriminatory' " and not " 'save[d]' " by the Twenty-First amendment. *Id.* at 1134-35. On appeal, Florida's Director of Division of Alcoholic Beverages and Tobacco – like the Superior Court here – took an absolutist position on the Twenty-First Amendment, relying upon the early decision in *Young's Market*. *Id.* at 1135-36. The Florida

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[9] The same error infects the Superior Court's rejection of Plaintiffs' Equal Protection claims, which were, moreover, supported by newly discovered evidence not available at the time of *Heublein*. *See, e.g.*, RI222:Third Trans. at 11("What I'm telling you is that there is a piece of legislation in the Governor's office that provides the tax benefits to ***our own people*** and ***our own agricultural products***, both with respect to alcohol tax on distilled spirits and on domestically produced wine").

Supreme Court disagreed, however, holding that "under a more recent line of cases, culminating in the Bacchus decision, the proper analysis to be employed where it is maintained that twenty-first amendment concerns save an otherwise discriminatory state law from attack under the commerce clause is 'whether the principles underlying the Twenty-first Amendment are sufficiently implicated by [that law] to outweigh the Commerce Clause principles that would otherwise be offended.' " *Id.* at 1136 (citation omitted, alteration original). Applying this analysis, the Florida Supreme Court held that "the record in this case leads us to conclude that the interests which the state maintains are furthered by this legislation are not substantial enough to outweigh the federal interest in free and unrestricted trade among the several states." *Id.* at 1137.

The *Ivey* Court considered and rejected the same justification raised in the present case. The Florida "import" statute, like the Georgia "import" statute, purported to "find" that administrative costs were greater for out-of-state beverages. *See id.* at 1132.[10] The *Ivey* Court noted that this "approach" to Twenty-First Amendment concerns "suggests 'limits on the substantiality' of the interests [the State] asserts":

> Further, the premise that the costs of regulating and administering imported alcoholic beverages are greater than those for domestic alcoholic beverages *is erroneous*. It is clear from the record

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[10] The Florida Supreme Court itself noted the similarity and quoted the counterpart Georgia "finding." *Ivey*, 541 So. 2d at 1137 & n.6.

> that it actually costs less on a per gallon basis to regulate and administer imported alcoholic beverages than it does to regulate and administer alcoholic beverages manufactured in state. In fact, it appears that, prior to passage of the amendment, DABT officials informed the legislature that "the cost to regulate the imported products on a per gallon basis will be lower than the cost to regulate non-imported products." Memorandum from Pedro M. Gonzalez, Chief, Bureau of Audit Operations, DABT to C.L. Ivey, Dir., DABT (May 25, 1988) (Re: Cost of Regulating Alcoholic Beverages Under Proposed CS for SB 1326). Further, there was no evidence presented of laws or regulations, other than the one at issue, which are peculiar to imported beverages or which would result in added costs in connection with those beverages.

Id. at 1138.[11] The Superior Court erred in refusing to consider the approach taken by the *Ivey* courts, by

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[11] There is like evidence in the present case. *E.g.*, Exhs. X & Y (analysis by Ed Vaughn (now deceased), then Director of the Alcohol & Tobacco Tax Unit of the Georgia Revenue Dep't); *see generally* RI220:103-14:(R11682-93). But in this case, unlike *Ivey*, all such evidence was suppressed – a ruling to which Plaintiffs assign error *infra*. Further, Plaintiffs submitted extensive additional evidence proving that the finding was, in the words of the Florida Supreme Court, "erroneous." *See, e.g.*, RI220:63-90:(R11642-69). Plaintiffs also showed the finding to be a sham on its face. The statement purported to find that "the cost of regulating and administering the manufacture, distribution, and sale" is greater for out-of-state product than for in-state product. 1985 Act § 1. Of course, out-of-state product is by definition *never manufactured* in Georgia while in-state product is by definition *always manufactured* in Georgia. Administrative costs for the manufacture of out-of-state product can therefore *never* be greater. *See, e.g.*, RI220:111-12: (R11690-91).

ignoring the considerable evidence probative of these issues, and by denying Plaintiffs an evidentiary hearing. It should be clear that, before one can consider whether "twenty-first amendment concerns save an *otherwise discriminatory* state law," *see id.* at 1136, one must first establish whether the state law is discriminatory. Similarly, in order to consider " 'whether the principles underlying the Twenty-first Amendment are sufficiently implicated by [that law] *to outweigh* the Commerce Clause principles that *would otherwise be offended*,' " *see id.* (citation omitted), one must first establish whether the Interstate Commerce Clause would otherwise be offended and to what extent. A "weighing" process would be impossible without first making these findings.

Other courts addressing the interplay of the Interstate Commerce Clause and the Twenty-First Amendment have taken the same approach. In *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994), the Fifth Circuit first conducted what it called a "traditional Commerce Clause" analysis, *see Cooper*, 11 F.3d at 554, and concluded that portions of the Texas Alcoholic Beverage Code were in violation of the Clause, *see id.* at 552-54, before taking up the Texas defendants' "alternative argument [that,] even if the statutes violate traditional Commerce Clause principles, the Twenty-first Amendment imbues the States with carte blanche authority to manage the flow of alcohol within their borders," *see id.* at 554. This alternative argument was ultimately rejected because "The core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause." *See id.* at 555. Again, in the instant case, the

Superior Court could not accord proper "weight" to the violation of the principle of nondiscrimination animating the Interstate Commerce Clause without first having considered whether and to what extent there is a Commerce Clause violation. Similarly, in *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950 (Ind. App. 1996), the court developed a more intricate way of according weight as between Twenty-First Amendment concerns and Interstate Commerce Clause concerns, *see* 662 N.E.2d at 969,[12] but there was no disagreement about the necessity of performing a full-scale Commerce Clause analysis in a case potentially implicating the Twenty-First Amendment. The *Indiana Wholesale* court expressly considered this precise question and concluded:

> If the operation of the Twenty-first Amendment is to "save" state regulation otherwise invalid under the "negative" Commerce Clause, see *Bacchus Imports, Ltd. v. Dias (1984) 468 U.S. 263, 274, 104 S. Ct. 3049, 3056, 82 L. Ed. 2d 200,* one must a fortiori conclude that the state regulation is constitutionally infirm ***before*** considering the extent to which the Twenty-first Amendment "saves" the regulation from invalidity. This is the approach used by the Supreme Court in Bacchus, and we follow that approach here.

Indiana Wholesale, 662 N.E.2d at 964. The *Indiana Wholesale* court ultimately struck down the Indiana statute at issue

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[12] The opinion was later in part vacated on the ground that constitutional questions could be avoided through statutory construction. *Indiana W.W.&L. Co., Inc. v. State*, 695 N.E.2d 99 (Ind. 1998).

as a violation of the Interstate Commerce Clause, notwithstanding its more intricate analysis of the Twenty-First Amendment case law. *Id.* at 971. Numerous other decisions confirm that a court must "turn first ***before assessing the impact of the Twenty-first Amendment*** to consider whether the [state] statute does in fact conflict with federal law." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698, 104 S. Ct. 2694, 2700 (1984).[13] The Superior Court erred by refusing to consider Plaintiffs' claims.

1. The Superior Court erred in countermanding *Ivey*, *Duffy*, and other decisions by refusing to harmonize the Twenty-First Amendment and the Commerce Clause and by holding, instead, that the declared purpose is determinative and, further, that all legislative history and other evidence is irrelevant.

Defendants below attempted to distinguish Florida's resounding rejection of the "import" approach on the

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[13] *Accord California Ret. Liq. Deals. Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980); *Bacchus*, 468 U.S. 263, 104 S. Ct. 3049; *Rice v. Alcoholic Bev. Cont. Apps. Bd.*, 21 Cal. 3d 431, 439, 579 P.2d 476, 482 (1978) ("Our first inquiry"); *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 707 (S.D. Tex. 2000) ("In applying the two-tier balancing test to challenged liquor statutes to determine whether they discriminate against out-of-state interests and, if so, whether they are 'saved' by the twenty-first amendment"); *see also Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1017 (W.D. Mo. 1998); *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 832 (N.D. Ind. 1999). The *Kronheim* case – cited, but not followed, by the Superior Court – was no exception. *See Milton S. Kronheim & Co. v. District of Col.*, 91 F.3d 193, 201-03 (D.C. Cir. 1996).

ground that the purposes for the Florida statute "did not include the promotion of temperance nor the aid of the State's police power."[14] If Defendants shift to a temperance and police power defense of the 1985 Statute, it should be noted that such a defense has proven unavailing in other cases. For instance, in *Cooper*, Texas launched a similar defense:

> Defendants' purported justifications are unpersuasive and insufficient to defend the State's arbitrary treatment of non-Texans. The State contends first that its distribution system was established "to protect the health, safety, welfare, morals and temperance" of its citizens. Tex. Alco. Bev. Code Ann. § 1.03 (West 1978) (articulating these as the policy goals underlying the Texas Liquor Control Act). ***Such boilerplate enabling language hardly explains*** the State's particular restrictions on out-of-state ownership of various liquor licenses.

Cooper, 11 F.3d at 554.

Moreover, Plaintiffs submitted considerable evidence to demonstrate that an important effect of the double taxation imposed by the 1985 Statute is to create a substantial price reduction, or price break, for in-state beverages when they are offered for sale to Georgia consumers

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[14] This reflects a too narrow understanding of the Florida statute; the Florida Supreme Court recited that the Florida Legislature had also imposed the so-called import tax " 'in order to protect the health, safety, welfare, and economic integrity of the state.' " *See Ivey*, 541 So. 2d at 1132 (quoting legislative history). This statement clearly encompassed what Defendants call a "police power" rationale and, possibly, a "temperance" rationale as well.

at the retail level. *See, e.g.*, RI220:84, 86-87(R11563, 11665-66). Under similar circumstances, the court in *Indiana Wholesale* observed that an argument based upon temperance "would seem to be at odds with the undisputed 'core concern' of promoting temperance, since *by seeking lower prices for its citizens a State would presumably be taking steps toward increased, rather than decreased, consumption.*" *Indiana Wholesale*, 662 N.E.2d at 967 n.29. Even without a price break to the consumer, the temperance rationale is unavailing:

> With respect to the promotion of temperance, however, the *Loretto Winery* opinion demonstrates quite persuasively that temperance is unlikely to be promoted by regulations which discriminate between in-state and out-of-state economic interests. In *Loretto Winery*, the court struck down New York's attempt to permit "wine products" containing New York grapes to be sold in grocery stores, while restricting sales of identical "wine products" with out-of-state grapes to package liquor stores. Rejecting the State's claim that a temperance goal was furthered by the regulation, the court aptly stated: "The drinkers will become just as drunk on [wine products] whether the grapes come from New York, California, or any of the six or so other states which produce wine grapes".

Id. at 969 n.34 (quoting *Loretto Winery*, 601 F. Supp. at 863; alteration in *Indiana Wholesale* original); *see also Dickerson*, 87 F. Supp. 2d at 710.

There is guidance from the United States Supreme Court specifically with reference to how a purpose challenge should be adjudicated generally and in particular

when the State defends with a rationale under the Twenty-First Amendment. In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S. Ct. 720 (1987), the State of New York defended the challenged state statute as "further[ing] the State's interest in promoting temperance." *Duffy*, 479 U.S. at 351, 107 S. Ct. at 729. The effect of the state statute at issue there was to increase the number of retail outlets for liquor. The *Duffy* Court, echoing similar considerations set out above by the *Indiana Wholesale* and *Loretto Winery* courts, noted:

> One would hardly suggest that the New York Legislature set out to promote temperance by increasing the number of retail outlets for liquor.

Duffy, 479 U.S. at 351, 107 S. Ct. at 729. The *Duffy* Court declined to "reach the question whether New York's liquor-pricing system could be upheld as a exercise of the State's power to promote temperance," but went on to hold affirmatively that "the Twenty-first Amendment provides no immunity" for New York's Commerce Clause violation. *See* 479 U.S. at 351-52, 107 S. Ct. at 729-30.

The *Duffy* Court's approach to the Twenty-First Amendment issue is highly instructive. The New York Legislature, in its recitals, stated that the statute had been "enacted 'for the purpose of fostering and promoting temperance.' " 479 U.S. at 351 n.13, 107 S. Ct. at 729 n.13 (quoting legislative history). This statement notwithstanding, the Court observed that the New York courts[15] "did not find that the statute ***was intended*** to promote

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[15] The case came to the Court from the New York State court system, not from the lower Federal courts.

temperance, or ***that it does so***." 479 U.S. at 351, 107 S. Ct. at 729. Finding no "factual findings of the state courts" to support the assertion by New York, as litigant, of Twenty-First Amendment immunity, the Court undertook a review, of its own, of legislative history and other evidence in the record. The Court observed that the New York Legislature's "statement" of purpose was "not supported by specific findings, or by evidence in the record." 479 U.S. at 351 n.13, 107 S. Ct. at 729 n.13. The Court went on to review more legislative history in order to demonstrate this lack of evidentiary support:

> The legislative Report accompanying § 101-bb does not suggest that the amendment was aimed at decreasing consumption. Rather, the Report focuses on the need to protect small retailers. New York State Legislature, Senate Excise Committee, Final Report 30, 37 (Mar. 1971). The Report does express concern over the increase in liquor consumption during the years between 1964 and 1971. *Id.*, at 16. But the Report recognizes the Moreland Commission's finding that higher prices do not reduce consumption, and states that "because of the multiplicity of factors involved and lack of data on specifics, the Committee is unable to determine what portion of such increase is attributable to any particular factors." *Id.*, at 14.

Id.; *see also* 479 U.S. at 351, 107 S. Ct. at 729 (reviewing additional legislative history, the findings of the Moreland Commission). Finding no supporting factual findings from the state courts and no evidentiary support from its own review of the record, the Court declined to "reach the question whether New York's liquor-pricing system *could* be upheld as a exercise of the State's power

to promote temperance." *See* 479 U.S. at 351-52, 107 S. Ct. at 729-30.[16] The Legislature's bare "statement" of purpose, without evidentiary support, would not suffice, and the question fell out of the case. Indeed, without such support, the Court "conclude[d] that the Twenty-first Amendment provide[d] no immunity." 479 U.S. at 351-52, 107 S. Ct. at 729-30.[17] The *Duffy* Court's approach is

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[16] The Court took the same approach in *Midcal Aluminum* when, having concluded that the stated 21st Amendment concerns were "unsubstantiated" by "the evidence" and "the record in this case," the Court noted that it "need not consider" whether these interests could prevail in a case where supported. 445 U.S. at 113-14, 100 S. Ct. at 947.

[17] *See also Ivey*, 541 So.2d at 1137-40 (examining "record" and legislative history to overturn legislative "premise that the costs of regulating and administering imported alcoholic beverages are greater than those for domestic alcoholic beverages" as "erroneous"; finding "no evidence" "demonstrating that imported beverages account for more of these costs than is represented by their proportionate share of the market"); *Capital Cities*, 467 U.S. at 714-16, 104 S. Ct. at 2708-09 (examining record for purpose state law "designed principally to further" and district court findings on actual effect to assess "nature" and "substantiality" of stated 21st Amendment interests); *Midcal*, 445 U.S. at 110-14, 100 S. Ct. at 946-48 ("careful scrutiny" to stated 21st Amendment purposes and whether there was a cause-and-effect "correlation" "supported by the evidence"); *Bacchus*, 104 S. Ct. at 3055 (examining legislative history for "legislature's motivation"); *Kendall-Jackson Win., Ltd. v. Branson*, 82 F. Supp. 2d 844, 865-67 (N.D. Ill. 2000) (whether "advances" 21st Amendment interest; "how . . . discrimination . . . advances this objective"; "discrimination has not been shown to advance any legitimate purpose"); *Pete's*, 19 F. Supp. 2d at 1018-20 (whether "evidence" shows that state law "promotes" 21st Amendment purpose; "as a matter of fact" no such "purpose" or "effect"; whether "accomplishes any of these objectives"; "advance is so

instructive for the instant case in several ways. It shows that a judicial inquiry into legislative intent as a factual matter, including a review of legislative history, is both authorized and required. It shows that judicial inquiry into the actual effect as a factual matter and whether it satisfies the intent or purpose as a factual matter is likewise both authorized and required (whether the actual effect "does" in fact promote the intended purpose). It shows that, without such factual substantiation, an assertion of Twenty-First Amendment immunity will not be sustained – notwithstanding a qualifying statement of purpose by the enacting legislature. The *Duffy* decision,

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insubstantial that it is clearly outweighed by important federal objectives") *Indiana Wholesale*, 662 N.E.2d at 969-71 (looking for a "showing that [state law] here serves its purported interests"; finding asserted "premise" to be "unsubstantiated"); *Loretto*, 601 F. Supp. at 862-64 (examining whether state law in fact advanced 21st Amendment interest); *Rice*, 21 Cal. 3d at 451-59, 579 P.2d at 490-95 (examining evidence and legislative history to determine "what policies are furthered by" state statute at issue; "whether [provisions] clearly vindicate those policies," including whether they "do" in fact "promote" "declared purpose"); *Heublein, Inc. v. Department of Alc. Bev. Cont.*, 237 Va. 192, 198-99, 376 S.E.2d 77, 80 (1989) (examining "legislative background" to find purpose of economic protectionism even in absence of any such "avowed purpose"; whether state law "will promote" asserted 21st Amendment purpose); *see North Dakota v. United States*, 495 U.S. 423, 432-33 & n.5, 449-50, 110 S. Ct. 1986, 1993-94, 2002-03 (1990) (both four-Justice plurality and four-Justice partial dissent examine evidence to assess substantiality of stated 21st Amendment interests and whether state law was necessary to bring about desired result). Even the writing judge in the fractured *Kronheim* decision examined legislative history to find "motives." 91 F.3d at 203-04 (Sentelle, J.) (citing "legislative history" in *Quality Brands, Inc. v. Barry*, 715 F. Supp. 1138, 1140-41 (D.D.C. 1989)).

and the others cited, shows that the Superior Court committed error in holding that the stated purpose of the enacting legislature is absolutely determinative and, further, that all legislative history and other evidence is irrelevant.

2. The Superior Court erred in countermanding *Healy*, *Brown-Forman*, and other decisions by granting Twenty-First Amendment immunity with respect to Plaintiffs' nexus, multiple taxation, and tax-to-cost relation claims and, at a minimum, by granting such immunity to Plaintiffs' discrimination claims without requiring Defendants to prove that the 1985 Statute advances a core concern and is necessary to the furtherance of this concern.

Defendants sought below to capitalize on a subtle difference of interpretation as between the *Cooper* case and the *Indiana Wholesale* case. One would do well to explain this difference of interpretation because, properly understood, it can give no comfort to Defendants and their position in this case. Both *Cooper* and *Indiana Wholesale* are interpreting the decision in *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 109 S. Ct. 2491 (1989). In *Healy*, the four-Justice plurality struck down a Connecticut alcoholic beverages statute under two independent Interstate Commerce Clause claims or theories: The Connecticut statute was unconstitutional 1) as a direct regulation of interstate commerce, *see* 491 U.S. at 331-40, 109 S. Ct. at 2496-2501, and 2) as discriminatory against interstate commerce, *see* 491 U.S. at 340-41, 109 S. Ct. at 2501-02. Justice Scalia concurred only as to the discrimination claim and, when

addressing the interplay of the Twenty-First Amendment and the Commerce Clause on such a claim, stated: "This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character ***eliminates the immunity afforded by the Twenty-First Amendment.***" *Healy*, 491 U.S. at 344, 109 S. Ct. at 2504 (Scalia, J., concurring).

Cooper relied upon Justice Scalia's statement to conclude that the "core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause." *Cooper*, 11 F. 3d at 555. *Indiana Wholesale*, by contrast, would apply an alternative test in the case of core concerns by requiring the State to demonstrate that the actual effect of the challenged statute "in fact advanc[es] a 'core concern' [and] is 'necessary' to the furtherance of the 'core concern.' " *Indiana Wholesale*, 662 N.E.2d at 969 (citation and footnote omitted). Applied to the present case, these authorities yield this approach. As to Plaintiffs' nexus, multiple taxation, and tax-to-cost relation claims (what *Healy* and other cases sometimes call direct regulation challenges), there is no dispute among any of these authorities that the Twenty-First Amendment is totally unavailing. *See Healy*, 491 U.S. at 334-35, 109 S. Ct. at 2498 (plurality opinion) (citing *Brown-Forman*, 476 U.S. at 585, 106 S. Ct. at 2088 (holding supported by five Justices)). As to Plaintiffs' discrimination challenges, the Twenty-First Amendment is either totally unavailing (under the authority of *Cooper* and the Scalia concurrence in *Healy*) or, assuming Defendants can successfully demonstrate a so-called core concern (which Plaintiffs vigorously dispute), there should be a further

test requiring Defendants to prove as a factual matter that the 1985 Statute in fact advances this core concern and is necessary to the furtherance of this core concern (under the authority of the *Indiana Wholesale*).

D. The Superior Court erred in failing to address Plaintiffs' multiple Foreign Commerce Clause claims.

When a state tax is challenged as violative of the Foreign Commerce Clause, an even "more extensive constitutional inquiry is required." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446, 99 S. Ct. 1813, 1820 (1979); *accord South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237, 2247 (1984) ("more rigorous and searching scrutiny"); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 185, 103 S. Ct. 2933, 2950 (1983) ("additional scrutiny required"). In the case of a Foreign Commerce Clause challenge, the same tests under the Interstate Commerce Clause apply, and then "two additional questions must be asked":

> "*first*, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, *second*, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign government."

Wardair Canada, 477 U.S. at 8, 106 S. Ct. at 2373 (citation omitted). Plaintiffs asserted, and submitted voluminous evidence in support of, Foreign Commerce Clause claims under each of these tests. *See, e.g.*, RI220:28-32, 63-117 (R11607-11, 11642-96). The Superior Court erred in granting summary judgment without requiring Defendants to

"negate at least one essential element" under each of these claims and, further, without addressing the claims in any way. *Tollman*, 224 Ga. App. at 519, 481 S.E.2d at 233.

E. The Superior Court erred in granting Twenty-First Amendment immunity with respect to Plaintiffs' Foreign Commerce Clause Claims.

As to Plaintiffs' Interstate Commerce Clause nexus, multiple taxation, and tax-to-cost relation claims, there is no dispute that the Twenty-First Amendment is unavailing. *See Healy*, 491 U.S. at 334-35, 109 S. Ct. at 2498 (plurality opinion) (citing *Brown-Forman*, 476 U.S. at 585, 106 S. Ct. at 2088 (holding supported by five Justices)). Plaintiffs submit that there is likewise no Twenty-First Amendment immunity as to the counterpart Foreign Commerce Clause claims. Although there is no settled case law disallowing Twenty-First Amendment immunity as to the remaining Foreign Commerce Clause claims, a grant of such immunity to any one State is unsupportable under our Federal structure because it would clearly "prevent[] the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Wardair Canada*, 477 U.S. at 8, 106 S. Ct. at 2373 (citation omitted). To the extent it found and applied Twenty-First Amendment immunity to deny Plaintiffs' Foreign Commerce Clause claims, the Superior Court erred, and the summary judgment must be reversed.

F. The Superior Court erred in failing to require Defendants to negate Plaintiffs' Import-Export Clause Claims.

In 1976, the United States Supreme Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535 (1976), revamped the jurisprudence of the Import Export Clause. Before *Michelin*, the jurisprudence directed courts to examine whether a foreign good still had the status of an "import" at the time it became subject to a state exaction. To this end, courts often inquired whether the foreign good was still within its original package. In 1976, this "inquiry" into the "status" of foreign goods "as imports and exports" was "abandoned in *Michelin*." *Department of Revenue v. Association of Washington Stevedoring*, 435 U.S. 434, 760, 98 S. Ct. 1388, 1404 (1978). Starting with *Michelin*, courts are directed to examine, not whether the good retained its status as an import, but rather whether the state exaction constitutes an Impost or Duty within the meaning of the Clause. Under this new inquiry, the court must "examine[] whether the exaction offended ***any*** *of the three policy considerations* leading to the presence of the Clause." *Id.* 435 U.S. at 752-53, 98 S. Ct. at 1400-01. Plaintiffs asserted, and submitted evidence in support of, an Import Export challenge to the "import"-taxing 1985 Statute. *See, e.g.*, RI220:52-58, 116-17(R11631-37, 11695-96). The Superior Court erred in granting summary judgment without requiring Defendants to "negate at least one essential element" of Plaintiffs' Import Export claims. *Tollman*, 224 Ga. App. at 519, 481 S.E.2d at 233.[18]

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G. The Superior Court erred by applying abandoned case law to reject Plaintiffs' Import-Export Clause Claims.

The Superior Court held that "Plaintiffs' . . . Import-Export Clause . . . arguments are disposed of by, *inter alia*, the decision in *Heublein*, the Twenty-first Amendment and the decisions thereunder discussed above, and by the Georgia Constitution." RI289:14. No Import-Export claim was asserted in *Heublein*, however. The Superior Court went on to provide a string cite at Defendants' urging, which included the following: "*House of Seagram, Inc. v. State Liquor Authority*, 292 N.Y.S. 2d 183 (N.Y. App. 1968) (tax on liquor which comes to rest in taxing state does not violate Import-Export Clause), *aff'd*, 303 N.Y.S. 2d 880 (N.Y. 1969), *cert. denied*, 396 U.S. 121, 90 S.Ct. 396 (1969)." RI289:14. This inquiry into the foreign liquor products' status at the time the 1985 Statute is imposed upon them and application of the *House of Seagram* decision, both urged upon the Superior Court by Defendants, are no longer correct under the law. Not only did the United States Supreme Court put aside this status-as-import inquiry in *Michelin*, the Court (when repeatedly presented with this now invalid argument) expressly admonished that the "inquiry" into "when goods lose their status as imports and exports" was "***abandoned*** in *Michelin*." *Washington Stevedoring*, 435 U.S. at 760, 98 S. Ct. at 1404; *see also Limbach*, 466 U.S. at 360, 104 S. Ct. at 1842; *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 153, 107 S. Ct. 499, 513 (1986). Indeed, the 1968 *House of Seagram* decision, from New York's Third Department, expressly relied upon and applied the now discredited "original package" rule and the associated inquiry into

the status of the imported good at the time it becomes subject to state exaction, citing *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419, and *Department of Revenue v. James Beam Co.*, 377 U.S. 341, extensively, among others. *See House of Seagram*, 292 N.Y.S. 2d at 185-84. But the United States Supreme Court has since that time specifically referred to these parts of both decisions as no longer good law:

> ***Before** Michelin*, the primary consideration was whether the tax under review reached imports or exports. With respect to imports, the analysis applied the original-package doctrine of ***Brown v. Maryland***, 12 Wheat. 419, 6 L.Ed. 678 (1827); see, e.g. ***Department of Revenue v. James B. Beam Distilling Co.***; *Anglo-Chilean Corp. v. Alabama*; *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872), ***overruled in** Michelin Tire Corp. v. Wages*.

Washington Stevedoring, 435 U.S. at 752, 98 S. Ct. at 1400. In any event, as noted, the status-as-import inquiry has since expressly been "abandoned." *Id.* 435 U.S. at 759, 98 S. Ct. at 1404. The Superior Court erred in relying upon bad law to reject Plaintiffs' Import Export claims.[19]

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[19] To the extent it was relying upon the string cite reference to the 21st Amendment in rejecting Plaintiffs' Import Export claims, the Superior Court likewise committed error. It was precisely the *Beam Distilling* decision, among others, that established that the 21st Amendment did not operate as a pro tanto repeal of the Import Export Clause, 377 U.S. at 345-46, 84 S. Ct. at 1249-50: "To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor its

H. The Superior Court erred in striking Plaintiffs' evidence.

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1. The Superior Court erred in striking Plaintiffs' expert testimony.

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2. The Superior Court erred in holding that Plaintiffs had not authenticated their evidence.

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3. Legislative history evidence.

Defendants' central evidentiary objection – to the relevance of legislative history – warrants greater

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history leads to such an extraordinary conclusion. *This Court has never intimated such a view, and now that the claim for the first time is squarely presented, we* ***expressly reject it.***" (The same error infects the Superior Court's rejection of Plaintiffs' Georgia constitutional claims – to which the 21st Amendment can supply no immunity.)

This part of *Beam Distilling* (unlike the part concerning the status-as-import inquiry) has never been questioned. In fact, *Beam Distilling* supports Plaintiffs' Import Export claims. The Kentucky tax was imposed upon the " '*transporting* or *shipping* [of the] distilled spirits under consideration *into th[e] state,*' " 377 U.S. at 343, 84 S. Ct. at 1248 (citation omitted) – much like the 1985 Statute, which imposes the tax "upon the *importation" into the State of Georgia* of liquor products from overseas, O.C.G.A. § 3-4-60(2). In *Beam Distilling*, the Court easily concluded that this sort of tax "is clearly of a kind prohibited by the Export-Import Clause." 377 U.S. at 343, 84 S. Ct. at 1248.

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attention. There is no question but that this evidence is relevant and admissible under Plaintiffs' Fourteenth Amendment claims:

> Determining whether invidious discriminatory purpose was a motivating factor ***demands a*** *sensitive inquiry into such circumstantial and direct evidence of intent as may be available.*

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266, 97 S. Ct. 555, 564 (1977).[23] Such direct evidence of intent expressly includes "such evidentiary factors as . . . *the legislative or administrative history.*" *Id.* at 1415. In *Arlington Heights*, the Court stated:

> The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker's purposes. . . . *The legislative or administrative history may be highly relevant, especially where there are* ***contemporary statements by members of the decision-making body, minutes of its meetings, or reports.*** *In some extraordinary instances* ***the members might be called to the stand at trial to testify concerning the purpose of the official action.*** . . .

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[23] *See also Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984); *Lodge v. Buxton*, 639 F.2d 1358, 1363 & n.8, 1373 & n.29 (5th Cir. Unit B 1981), *aff'd sub nom., Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272 (1982).

429 U.S. at 267-68, 97 S. Ct. at 564-65 (citation omitted, paragraph structure altered).[24] Thus, the question arguably[25] becomes whether such evidence is admissible under Plaintiffs' Commerce Clause and Import Export Clause claims as well. Plaintiffs make some five additional arguments in favor of the relevance of this evidence.

First, cases casting a skeptical eye toward this kind of evidence are usually confronted with testimony made by an individual *after the fact* and opining in retrospect as to reasons for past legislative action. By contrast, Plaintiffs' legislative history evidence was created contemporaneously with the events in question and does not involve the retrospective opinions of individuals.

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[24] *See also Arlington Hts.*, 429 U.S. at 270 & n.20, 97 S. Ct. at 566 & n.20 (plaintiffs permitted to call board member to the stand at trial and, "both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision").

[25] Throughout, Plaintiffs have presented, as here, alternative theories supporting admissibility. "It is a cardinal rule of evidence that if evidence is duly admissible under any legitimate theory, it should be admitted even though it does not qualify for admission under one or more other evidentiary theories. That is, generally evidence should be admitted if it is admissible for any legitimate purpose." *Buttles v. State*, 229 Ga. App. 300, 302, 494 S.E.2d 73, 75 (1997) (quoting *Campbell v. State*, 215 Ga. App. 14, 16(3), 449 S.E.2d 366 (1994)); *cf. Brantley v. State*, 177 Ga. App. 13, 15, 338 S.E.2d 694, 697 (1985) ("if the admissibility of evidence is doubtful, the rules of evidence [nevertheless] require that the evidence be admitted and its weight and effect left to the jury"); *Benton v. Chatham County*, 206 Ga. App. 285, 289, 425 S.E.2d 317, 321 (1992) ("Georgia law favors the admission of any relevant evidence no matter how slight its probative value").

Second, cases questioning this kind of evidence have always been careful to preserve its admissibility when the substantive law governing the plaintiff's claim makes intent or purpose relevant. The Commerce Clause jurisprudence authorizes a challenge based upon discriminatory purpose. In *Bacchus,* for instance, the United States Supreme Court itself relied upon legislative history to make its finding of economic protectionism and discrimination in "both . . . **purpose and effect**." *Bacchus,* 468 U.S. at 273, 104 S. Ct. at 3056 (footnote omitted). Calling this a "finding" (that is, a fact-bound determination), the *Bacchus* Court examined and relied upon the legislative history leading up to the enactment of the exemption for certain in-state beverage alcohol products:

> The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c.26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c.39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056.

Id. 468 U.S. at 270-71, 104 S. Ct. at 3055 (citation omitted); *see also James B. Beam Distilling Co.,* 259 Ga. at 364, 382 S.E.2d at 96 ("The ***record demonstrates that the purpose and effect*** of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce

Clause of the U.S. Constitution").[26] Further, Plaintiffs rely upon the Commerce Clause cases holding that, as a consequence of the strict scrutiny governing such a case, a

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[26] *Accord Heublein*, 256 Ga. at 584-85, 351 S.E.2d at 196 (requiring a challenge to purpose); *Chemical Waste Man., Inc. v. Hunt*, 504 U.S. 334, 343 n.6, 112 S. Ct. 2009, 2015 n.6 (1992);*West Lynn Cream., Inc. v. Healy*, 512 U.S. 186, 201, 114 S. Ct. 2205, 2214-15 & n.18 (1994) (examining legislative history to establish that "in-state interests" had "lobb[ied]" for state law and had been "in fact its primary supporters"); *Hunt v. Washington State Apple Ad. Comm'n*, 432 U.S. 333, 352, 97 S. Ct. 2434, 2446 (1977) (in response to plaintiff's suggestion that "discriminatory impact on interstate commerce was" intentional and not merely "unintended," Court examines "indications in the record," including "most glaring," a "response of the North Carolina Agriculture Commissioner to the [plaintiff]'s request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would 'want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed*' " (emphasis original)); *In re Wash. Pub. Supp. Sys. Sec. Litig.*, 673 F. Supp. 411, 417 (W.D. Wash. 1987) ("***Legislative purpose** has also been found to be a legitimate inquiry in challenges brought under . . .* the Due Process Clause, and *the Commerce Clause*" (footnote omitted). Indeed, this was the conclusion of Judge Hull in this case when the question arose during discovery. *See* Trans. of Mar. 1, 1994 Procs. (certified Mar. 21, 1994) at 42, in Exh. PP to Plaintiffs' Notice of Filing Exhs. (E-3793) (filed Feb. 3, 1995), RI115 ("*discussions and legislative intent behind the wine and distilled spirits [statutes]* being talked about" is clearly discoverable and relevant because substantive claim "goes to the ***purpose** behind this statute* which is part of [Plaintiffs'] **element** of challenge to it"). *Plaintiffs must be permitted to present evidence supporting an "element" of their claims. On summary judgment motion, Plaintiffs, as nonmovants, are required to do so.* ***Plaintiffs submit that it was error to permit Defendants to prevent them from doing so.***

merely so-called "rational" purpose, or even the legislature's declared purpose, will not suffice to save a statute from invalidation if discrimination has been demonstrated: "Commerce Clause analysis differs from analysis under the 'rational basis' test. Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 476 n.2, 101 S. Ct. 715, 730 n.2 (1981) (per Powell, J.)[27]

Third, Plaintiffs submit that a similar rule is upheld by the Georgia cases, which permits evidence concerning legislative intent when offered to prove that legislative action was taken "on the grounds of fraud and corruption or manifest abuse." *Fulton County v. Dangerfield*, 260 Ga. 665, 667, 398 S.E.2d 14, 16 (1990). In other words, if the substantive claim authorizes an inquiry into the

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[27] *Accord Foster-Fountain Pack'g v. Haydel*, 278 U.S. 1, 10, 49 S. Ct. 1, 3 (1928) ("One challenging the validity of the state enactment on the grounds that it is repugnant to the commerce clause is not necessarily bound by the legislative declarations of purpose"); *Bayside F.F. Co. v. Gentry*, 297 U.S. 422, 426-27, 56 S. Ct. 513, 515 (1936) (reconfirming that, in *Foster-Fountain*, "ostensible purpose of the act was to conserve the raw shells for local use. The bill and affidavits in support of it, however, demonstrated, we held, that this purpose was feigned, and that the real purpose" was otherwise); *Postal T.-C. Co. v. Taylor*, 192 U.S. 64, 73, 24 S. Ct. 208, 211-12 (1903) (under Commerce Clause, "Courts are not to be deceived by the mere phraseology in which an ordinance may be couched when it appears conclusively that it was passed for an unlawful purpose and not for the one stated therein" (quoting syllabus)); *Postal T.-C. Co. v. City of Richmond*, 249 U.S. 252, 259-60, 39 S. Ct. 265, 266-67 (1919) (under Commerce Clause, plaintiff may prove that "the tax is a disguised attempt to tax interstate commerce").

circumstances under which legislative action was taken, as the Commerce Clause cases do, then the evidence of those circumstances is both relevant and admissible.

Fourth, even the older Georgia cases that were especially circumspect about this kind of evidence were careful to preserve an exception for challenges to legislation that impaired "private rights." *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 370, 3 S.E.2d 705, 712 (1939). At the time of *Holcombe*, a Commerce Clause challenge was understood to present a public question. In the intervening years, however, this understanding has changed to reflect the fact that a Commerce Clause plaintiff suffers a real injury to its property and its right to compete and do business. Today, the "Commerce Clause" is understood to "confer[] 'rights, privileges, or immunities' " upon the injured plaintiff. *See Dennis v. Higgins*, 498 U.S. 439, 446, 111 S. Ct. 865, 870 (1991) (citation omitted).[28] For further grounds showing the admissibility

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[28] *Fifth*, Defendants themselves put legislative history evidence into the record in support of their motion for summary judgment. *E.g.*, Oliver Aff. of Aug. 21, 1997 ¶ 49; Collins Aff. ¶ 15; Lenihan Aff. ¶¶ 5 & 7, RI211:(R8890, *et seq.*) Even though evidence be otherwise inadmissible, it may be admitted when the party opposing its admission opens the door. *See Tiftarea Shop., Inc. v. Maddox*, 187 Ga. App. 227, 228, 369 S.E.2d 545, 546 (1988); *Sheffield v. State*, 184 Ga. App. 141, 142, 361 S.E.2d 28, 30 (1987); *Mulkey v. State*, 250 Ga. App. 444, 446, 298 S.E.2d 487, 489 (1983). A party may not object to evidence if the party has "left the field wide open." *Tiftarea*, 187 Ga. App. at 228, 369 S.E.2d at 546. Once a party has opened the door, it is of no consequence that the party may not have intended to open the door so wide. *Sheffield*, 184 Ga. App. at 142, 361 S.E.2d at 30; *Grant v. State*, 178 Ga. App. 398, 399, 343 S.E.2d 422, 424 (1986).

of this evidence, see RI188:(R8293 *et seq.*); RI192:(R8392, *et seq.*); RI193:(R8411, *et seq.*); RI174:(R8016, *et seq.*); RI166:(R7387, *et seq.*); RI126:(R5403, *et seq.*); RI35:(R839, *et seq.*); RI33:(R808, *et seq.*)

At the same time, many of the Commerce Clause cases have been resolved by first inquiring whether the effect of the challenged legislation satisfies the declared purpose. In the present case, where Plaintiffs have also brought this kind of Commerce Clause claim in addition to their other Commerce Clause claims and where the summary judgment should be reversed in any event, Defendants' objections to the legislative history evidence can be reserved for later decision.

a. The Superior Court erred in countermanding *Capital Cities*, *Duffy*, and other decisions by setting up the Twenty-First Amendment as an evidentiary disqualification.

The above discussion demonstrates the relevance and admissibility of the legislative history evidence to Plaintiffs' claims. But the Superior Court did not address any of this. In this one instance, the Superior Court did provide an explanation, of an altogether different nature: This evidence had to be stricken because the "Twenty-first Amendment concerns articulated within the statute itself" required it. *See* RI289:16. This constituted error, under *Capital Cities*, *Duffy*, and like decisions. As noted, numerous decisions confirm that a court must "turn first ***before assessing the impact of the Twenty-first Amendment*** to consider whether the [state] statute does in fact

conflict with federal law." *Capital Cities*, 467 U.S. at 698, 104 S. Ct. at 2700.[29]

Not only did it err by setting up the Twenty-First Amendment as a reason not to address Plaintiffs' claims, the Superior Court compounded that error by turning the Amendment into an evidentiary disqualification as well. In fact, the *Duffy* decision shows that the enacting legislature's unsubstantiated "statement" of purpose, without evidentiary support, will not suffice to sustain a defendant's assertion of Twenty-First Amendment immunity, 479 U.S. at 351-52, 107 S. Ct. at 729-30, much less serve as a basis to exclude evidence relevant to the plaintiff's claim.[30]

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[29] *Accord Midcal*, 445 U.S. 97, 100 S. Ct. 937; *Bacchus*, 468 U.S. 263, 104 S. Ct. 3049; *Rice*, 21 Cal. 3d at 439, 579 P.2d at 482; *Ivey*, 541 So. 2d at 1138; *Cooper*, 11 F.3d at 554; *Dickerson*, 87 F. Supp. 2d at 707; *Indiana Wholesale*, 662 N.E.2d at 964.

[30] *See also Capital Cities*, 467 U.S. at 714-16, 104 S. Ct. at 2708-09; *Midcal*, 445 U.S. at 110-14, 100 S. Ct. at 946-48; *Bacchus*, 104 S. Ct. at 3055; *Ivey*, 541 So.2d at 1137-40; *Kendall*, 82 F. Supp. 2d at 865-67; *Pete's*, 19 F. Supp. 2d at 1018-20; *Loretto*, 601 F. Supp. at 862-64; *Heublein*, 237 Va. at 198-99, 376 S.E.2d at 80; *Indiana Wholesale*, 662 N.E.2d at 969-71; *see North Dakota*, 495 U.S. at 432-33 & n.5, 449-50, 110 S. Ct. at 1993-94, 2002-03.

4. The Superior Court erred in suppressing documents produced by Defendants in the *Beam* case.[31]

a. Collateral estoppel and res judicata operate to bar Defendants from disputing the admissibility of the *Beam* documents.

Defendants caused Exhibits denominated J, K, II, L, M, EE, FF, U, V, W, X, Y, DD, & HH to be suppressed. RI130. For an index to these Exhibits in the record, see RI227:(R11943, *et seq.*) The first five – concerning the

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[31] As a preliminary matter, it is important to determine what law, whether Georgia or Federal, governs questions of privilege in this case. As *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914, 917-18 & n.2 (Md. App. 1980), cited by Defendants, explains, Federal Rule of Evidence 501 describes the application of *Erie* principles to privilege. The Rule provides that, if "State law supplies the rule of decision" to the underlying substantive claim (*i.e.*, "to an element of a claim or defense"), then privilege will likewise "be determined in accordance with State law." Fed. R. Evid. 501. On the other hand, if Federal law supplies the rule of decision, then Federal law will likewise apply to privilege, and privilege will "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.* Of course, these Federal Rules apply by their terms to the Federal courts, but in this instance, Rule 501 is not so much providing a rule for Federal courts as it is describing the application of *Erie* principles to privilege. Under what are sometimes called reverse *Erie* principles, state courts are required to apply Federal law when adjudicating a Federal substantive law claim. In this case, since Plaintiffs' substantive law claims are governed by Federal law, this Court should likewise apply the Federal law of privilege (in most applications, not meaningfully different from the Georgia law of privilege).

legislative history of the 1985 Statute – were produced by Defendants in the *Beam* case, after Judge Hicks had overruled their objections and entered an order compelling production.[32] Overruling Defendants' renewed objections, Judge Hicks made this documentary evidence the basis of his ruling of unconstitutionality: "*The protectionist purpose of the statute is further indicated by the* ***exhibits 'A-3' through 'A-13'*** produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and *produced to plaintiffs by the defendants pursuant to this Court's Order of December 3, 1987*[]." RI113&116:94-98. On appeal, this Court affirmed the determination of unconstitutionality, with express reference to this same documentary evidence: "The **record** demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution." *James B. Beam Distilling Co*, 259 Ga. at 364, 382 S.E.2d at 96 (citing *Bacchus*, 468 U.S. 263, 104 S. Ct. 3049). With that, the determination of unconstitutionality became final.[33]

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[32] *See, e.g.*, RI113&116:94-98; *see also* RI36:(R874, *et seq.*); RI225:Taylor Aff. (filed Sept. 26, 1997). The remaining documents were likewise produced by Defendants, on remand in the *Beam* case. *See, e.g.*, RI113&116:100&n.27.

[33] On further review, the United States Supreme Court reversed the holding of prospectivity (*see James B. Beam*, 501 U.S. at 544, 111 S. Ct. at 2448 (per Souter, J.)), but not before noting and relying upon the by-then unchallenged and final underlying determination of unconstitutionality: "On cross-motions for summary judgment, the trial court agreed that § 3-4-60 could not withstand *Bacchus* attack for the years in question and that the tax had therefore been unconstitutional. . . . The Supreme Court of Georgia affirmed the trial court

In light of this prior litigation, the doctrines of collateral estoppel and res judicata operate to bar Defendants from disputing the admissibility of this documentary evidence and, further, from disputing the admissibility of this type of evidence. *See Jebco Ventures, Inc. v. City of Smyrna*, 259 Ga. 599, 385 S.E.2d 397, 399 (1989).[34] Under the doctrine of collateral estoppel, all of the Plaintiffs, not just Plaintiff Beam, are entitled to assert the *Beam* judgment against Defendants and their privies.

b. The *Beam* documents are not confidential and do not qualify for protection.

At the time of the July 1995 suppression of these documents, Defendants were still withholding other documents concerning the 1985 legislative session that, in turn, showed that the suppressed documents had been used on the floor of the Georgia House. The 1985 legislative session now shows that the suppressed documents were, by their public nature, not entitled to the various kinds of privilege or protection asserted by Defendants

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in both respects. *The court held the Pre-1985 version of the statute to have violated the Commerce Clause as, in its words, an act of 'simple economic protectionism.'* See 259 Ga. 363, 364, 382 S.E.2d 95, 96 (1989) (citing *Bacchus*)." *Beam*, 501 U.S. at 533, 111 S. Ct. at 2442.

[34] To the extent collateral estoppel and res judicata should be applied as a matter of Federal law, not state law, *see Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-62, 104 S. Ct. 1837, 1842-43 (1984), the Federal doctrines of collateral estoppel and res judicata mirror the Georgia doctrines, *see Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985).

and entitlement to which they have the burden to establish.[35] To take one example, the session demonstrates that Exhibit M (a memo by Divine and Busbee, who were neither parties nor represented parties), RI227, was not work product, but rather a "position paper." *See* RI222:First Trans. at 17. The very wide and public circulation of and use to which the suppressed documents were put and intended to be put, as now demonstrated by the 1985 session, show that these documents were not confidential and not intended to be confidential. Confidentiality is a prerequisite to the privileges,[36]

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[35] The privilege "is inconsistent with the general duty to disclose and therefore impedes investigation of the truth." *North Carolina Elec. Mem. Corp. v. Carolina P.&L. Co.*, 110 F.R.D. 511, 513 (M.D.N.C. 1986). "Accordingly, the privilege must be strictly construed." *Id.* "Further, the burden of persuasion on each of the elements of the privilege is clearly upon the proponent." *Id.*; *accord, e.g., Choat v. Rome Indus., Inc.*, 462 F. Supp. 728, 732 (N.D. Ga. 1978) ("burden of establishing entitlement to the attorney client privilege is on the one who raises it"). Further, in accordance with this burden allocation: "In considering whether a proponent of the privilege is entitled to protection, the Court must place the burden of proof squarely upon the party asserting privilege. Accordingly, the proponent must provide the court with enough information to enable the court to determine privilege, and the proponent must show by affidavit that precise facts exist to support the claim of privilege. A failure of proof as to any element causes the claim of privilege to fail." *North Carolina*, 110 F.R.D. at 515 (citation omitted).

[36] Regarding attorney-client privilege, see, *e.g., North Carolina*, 110 F.R.D. at 513 ("privilege applies only if . . . the communication . . . was . . . without the presence of strangers" (citing *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950)); 4 J. Wm. Moore & J.D. Lucas, Moore's Federal Practice ¶ 26.11[2], at 26-178 (2d ed. 1994); *Richards v. Smith*, 173 Ga. 424, 160 S.E. 608, 608 (1931) ("must be confidential"); *see also*

or protections,[37] Defendants have asserted.

Riley v. State, 180 Ga. 869, 181 S.E. 154, 155 (1935) ("of a confidential nature"); *Fowler v. Sheridan*, 157 Ga. 271, 121 S.E. 308, 309 (1924) (" 'only communications which are confidential are protected as privileged' " (citation omitted)); *Martin v. Anderson*, 21 Ga. 301, 308 (1857) ("confidential disclosures of his client"); *Southern Guar. Ins. v. Ash*, 192 Ga. App. 24, 383 S.E.2d 579, 583 (1989) (" 'attorney-client privilege extends only to confidential communications' " (citation omitted)); *Marriott Corp. v. American Acad. of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E.2d 785, 789 (1981) (" 'designed to secure the client's confidence in the secrecy of his communication' " (citation omitted)); *Atlanta Coca-Cola Bottl'g Co. v. Goss*, 50 Ga. App. 637, 179 S.E. 420, 421 (1935) (" 'confidential communications' " (citation omitted)).

Yet other prerequisites are missing. Defendants did not show that the information they sought to suppress was acquired from a client. *E.g., Skellie v. James*, 81 Ga. 419, 8 S.E. 607, 608 (1889) ("must have acquired his knowledge from his client"); *Parker*, 160 S.E. at 110 ("acquired the knowledge from his client"). Defendants made no effort to demonstrate that the information was not and could not have been acquired through any other means. *See Skellie*, 8 S.E. at 608 (if attorney "acquires the knowledge in any other manner, he is both competent and compellable to testify"); *Parker*, 160 S.E. at 110-11; *see also* T.F. GREEN, JR., *supra*, § 188, at 358 ("through any other means than through the attorney-client relation, . . . not privileged" (footnote omitted); *McDougald v. Lane*, 18 Ga. 444, 452 (1855) ("did not certainly appear . . . known . . . only by reason of his relation as Attorney to his client"); *Bracewell v. State*, 21 Ga. App. 133, 94 S.E. 90, 91 (1917) ("to testify . . . as to . . . knowledge . . . acquired in any other manner"). Defendants did not show that information was communicated for the purpose of securing legal advice. *See Marriott*, 277 S.E.2d at 792; *Atlantic C.L. RR. v. Dougherty*, 111 Ga. App. 144, 141 S.E.2d 112, 116-17 (1965). For further grounds showing the inapplicability of the privilege, see RI113&116:107-10.

[37] Most of the documents were suppressed on the ground of protections other than attorney-client privilege, that is, 1. on

c. The rule of waiver from partial disclosure applies to the *Beam* documents, even if they did qualify for protection.

Defendants themselves submitted evidence on what information was assertedly available to the General Assembly when it enacted the 1985 Statute. *See, e.g.*, Lenihan Aff. ¶ 5; Collins Aff. ¶ 15, RI211:(R8890, *et seq.*). Ever since "the nineteenth century, the Georgia courts have recognized a rule of waiver from partial disclosure." T.F. GREEN, JR., *supra*, § 195, at 364 (footnote omitted); *accord, e.g., Young v. State*, 65 Ga. 525, 527 (1880). In other words, even if Defendants had demonstrated that the privilege applied, the privilege would not apply for the reason that Defendants have made this an issue and have gone further and placed what they themselves contend is privileged testimony into evidence. Under the long-established rule of waiver from partial disclosure, Defendants cannot be allowed to get away with presenting their

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the basis of work product doctrine, not an absolute privilege, but which, by definition, allows for disclosure of the contents of documents under certain circumstances, *see* O.C.G.A. § 9-11-26(b)(3) ("Subject to paragraph (4) of this subsection, a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative" upon certain showings) and **2.** on the basis of "***Secrets*** of state," *see* O.C.G.A. § 24-9-21(4), which by its very nomenclature only involves actual "secrets." For other grounds showing the inapplicability of work-product protection, see RI113&116:110-13, and of "state secrets" protection, see RI113&116:113-21.

partial and carefully crafted version while using assertions of privilege to prevent Plaintiffs from showing the whole story.

d. Waiver applies to the *Beam* documents, even if they did qualify for protection.

Defendants' assertions here should be rejected on grounds of waiver in any event. Their own citation to the *Hamilton* case provides a useful statement of the waiver doctrine:

> [C]ourts have generally held that once a person waives his privilege by revealing, or permitting to be revealed, certain information, then the privilege will no longer be permitted to protect that same information from use or disclosure to the same or a similarly situated party who will use the information for the same purpose. In these circumstances, therefore, a prior waiver of the privilege is generally regarded as a waiver to the subsequent discovery or use of that information at a later trial of the same issues, or even unrelated issues.

Hamilton, 414 A.2d at 919 (citing numerous supporting cases, both Federal and state). The waiver doctrine has been regularly applied as well to the asserted privileges, or protections, at issue here. Speaking of attorney-client privilege, the court in *Cheeves v. Southern Clays, Inc.*, 128 F.R.D. 128, 129 (M.D. Ga. 1989), made these observations:

> As an initial matter the court notes that the attorney-client privilege is not a favored evidentiary concept in the law since it serves to obscure the truth, and should be construed as

> narrowly as is consistent with its purpose. . . . [W]here there has been a disclosure of a privileged communication, there is no justification for retaining the privilege. The general rule is that voluntary disclosure of privileged attorney-client communications constitutes waiver of the privilege as to all other such communications on the same subject matter.[38]

When Defendants produced the documents in the *Beam* case, any claim of privilege evaporated. "One cannot produce documents and later assert a privilege which ceases to exist because of the production." *See W.R. Grace*, 446 F. Supp. at 775. It does not matter that Defendants produced documents through counsel:

> The plaintiff now claims that the production was inadvertent and involuntary or if it is deemed voluntary that the privilege is waived only as to the piece of paper but nothing else. This is an untenable position. The plaintiff turned over to his attorney the documents to be produced. This letter was among them. The Court will not look behind this objective fact to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was

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[38] *Accord, e.g., Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 438 S.E.2d 633, 635 (1993) (attorney-client privilege); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 585 (N.D. Ill. 1981) (work product); *W.R. Grace & Co. v. Pullman Inc.*, 446 F. Supp. 771, 775 (W.D. Okla. 1976) (work product); *Hambro Auto. Corp. v. United States*, 381 F. Supp. 1403, 1406 (U.S. Cus. Ct. 1974) (executive privilege); *see also United States v. Reynolds*, 345 U.S. 1, 7, 73 S. Ct. 528, 532 (1953) (acknowledging applicability of waiver to executive privilege).

> produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 548-49 (D.D.C. 1970); *accord, e.g., United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (asserted inadvertence no excuse). Further, that there may have been a great number of documents produced is no excuse. "Notwithstanding the apparently voluminous amount of discovery involved, [the producing party] could have taken necessary steps to remove purported privileged documents prior to permitting discovery of same . . . ." *W.R. Grace*, 446 F. Supp. at 775; *accord, e.g., Kelsey-Hayes*, 15 F.R.D. at 465. That the documents were produced in another case makes no difference; a waiver in one case is a waiver as to a later case. *E.g., id.* at 464; *see Holloway v. Hoard*, 140 Ga. 380, 78 S.E. 928, 930-31 (1913) (spousal privilege).

The case of *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979), really captures what is going on in this case. Ironically, Defendants' present counsel is asserting privilege as to documents he himself produced on behalf of Defendants in discovery. But the privilege assertions are pressed with special urgency as to documents produced by Defendants' former counsel. Speaking of precisely this situation, the *Ocean Transporation* court held:

> For whatever reasons, original counsel did not mark these papers as potentially privileged and voluntarily turned them over. This must be deemed a complete waiver. Original counsel's

> responsibility was to determine the privileged status of [the] documents. Its decisions in this regard were binding on its client. Privilege claims cannot be reopened by retaining new counsel who read the privilege rules more broadly than their predecessor.

Ocean Transportation, 604 F.2d at 674.

e. Even if the *Beam* documents did qualify for protection, once the mantel of confidentiality was lifted, the policy underlying that protection ceased to apply.

Many courts reach the same result, not by applying waiver, but by acknowledging that the policy underlying privilege no longer applies once the mantel of confidentiality has, for whatever reason, been lifted. For instance:

> Since the privilege exists in derogation of the overriding interest in full disclosure of all competent evidence, when the policy underlying the rule can no longer be served, it would amount to no more than mechanical obedience to a formula to continue to recognize it.

E.g., *Kelsey-Hayes*, 15 F.R.D. at 465. Such cases recognize that, once the information has become public, it can no longer be retrieved and made confidential again. For instance:

> Once the document was produced for inspection, *it entered **the public domain***. Its confidentiality was breached thereby destroying the basis for continued existence of the privilege.

E.g., *Underwater Storage*, 314 F. Supp. at 549. This is especially true when the information is already known to the

other parties, their attorneys, other witnesses, and has indeed already been the basis for earlier proceedings. *See, e.g., Ocean Transportation*, 604 F.2d at 674 ("The Government attorneys' minds cannot be expunged, the grand jury is familiar with the documents, and various witnesses' testimony regarding the papers has been heard"); *Kelsey-Hayes*, 15 F.R.D. at 464-65 ("Plaintiff now knows the contents of the document and has photostatic copies of each of them").

Precisely the same observations can be made about this case. The documents were produced years ago, some as long ago as 1988. These documents have been in the public domain all these many years. All of these documents were copied at the time of inspection, copied with the permission and even assistance of Defendants through their lawyers Messrs. Spivey and then later Runnion (and, in the case of the Open Records discussed below, Formby). Plaintiffs and their attorneys have had these copies these many years and are thoroughly familiar with their contents. These documents have been made part of the public record in the *Beam* case (not to mention two parallel cases pending in DeKalb Superior) and have been thoroughly examined by three levels of court (Fulton Superior, this Court, the United States Supreme Court). Indeed, these documents form the basis for finally adjudicated findings of fact and holdings. Finally, as now demonstrated by the 1985 legislative session, these documents were widely disseminated and used, including in the public proceedings of the Georgia General Assembly. Under these circumstances, any policy interest supporting Defendants' asserted privileges has long since disappeared.

5. The Superior Court erred in suppressing Plaintiffs' Open Records.

The Revenue Department made available additional versions of the *Beam* documents, among others, in response to a March 6, 1991 request made pursuant both to the Open Records Act, O.C.G.A. §§ 50-18-70, *et seq.*, and to O.C.G.A. § 45-6-6. *See* RI272:(R20965, *et seq.*) On December 19, 1997, Defendants moved to strike. * * *

Likewise, court records qualify as public records and are subject to inspection and copying. *See Atlanta Title & Trust Co. v. Tidwell*, 173 Ga. 499, 160 S.E. 620, 627 (1931); 1967 Op. Att'y Gen. Ga. (No. U67-340) 465, 466 (Sept. 25, 1967); 1962 Op. Att'y Gen. Ga. 101, 103 (Oct. 15, 1962). *Compare, e.g.*, Exhs. J, M, X & Y, RI227, among other documents at issue, *with, e.g.*, copies of *Beam* December 1987 production documents, still bearing their exhibit stickers from the *Beam* case, as placed in the record by Judge Hull during the March 1994 hearing.[39] * * *

I. The Superior Court erred in holding that the *Heublein* decision barred Plaintiffs' multiple Interstate Commerce Clause claims and their multiple Foreign Commerce Clause claims – claims that were neither presented nor decided in *Heublein*.

As compared to the *Heublein* case, Plaintiffs have launched a much expanded challenge to the 1985 Statute,

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[39] *See* Trans. of Mar. 1, 1994 Procs. (certified Mar. 21, 1994) at 42, in Exh. PP to Plaintiffs' Notice of Filing Exhs. (E-3793) (filed Feb. 3, 1995), RI115.

including some five different claims under the Interstate Commerce Clause alone (and the Due Process Clause) as well as additional claims under the Foreign Commerce Clause, the Import Export Clause, and other constitutional provisions both State and Federal. These claims were not made in *Heublein*. Moreover, like the plaintiffs in *Ivey* and unlike the plaintiff in *Heublein*, Plaintiffs squarely made the challenge that was not presented in the *Heublein* litigation.

Under similar circumstances, the Florida Supreme Court concluded that the *Heublein* decision did not foreclose consideration of the validity of the import approach. For the same reasons and especially because the Florida Supreme Court (the only court to reach the merits of the import approach) has now condemned the import approach as unconstitutional, this Court must conclude that the limited *Heublein* decision, rendered in a case not presenting the same challenges as those made herein, cannot foreclose judicial consideration of Plaintiffs' claims. This conclusion easily squares, moreover, with the cases governing the doctrine of stare decisis. Even if *Heublein* were not by its terms so limited to a holding under the circumstances of that case and the unusual "conce[ssion]," Ivey, 541 So. 2d at 1137, the taxpayer made in that case,[40] the result would

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[40] Defendants maintained that the stare decisis effect of *Heublein* bars Plaintiffs' discriminatory purpose claims. A careful reading, however, shows that the decision can have no such effect. This Court was at pains to note that the taxpayer had expressly forgone all challenge on the basis of discriminatory purpose. 351 S.E.2d at 195-96. Because purpose went "unchallenged," *id.* at 196, this Court accepted at face

be the same under the customary law of stare decisis. * * * [41]

Moreover, after *Heublein* had been rendered, in the discovery phase of a separate action challenging the Pre-1985 Statute, the State of Georgia produced documents concerning the legislative history of the 1985 Statute that had not been produced or considered by the courts in *Heublein*. *Relying upon the newly disclosed evidence concerning the enactment of the 1985 Statute*, Fulton Superior found and held that even the purpose and effect of the Pre-1985 Statute were economic protectionism. On appeal, this Court, relying upon this same newly disclosed evidence concerning the legislative history of the 1985 Statute, affirmed. *James B. Beam Distilling Co.*, 259 Ga. at 364, 382 S.E.2d at 96 ("The *record* demonstrates that

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value the State's stated purpose for double taxation, "i.e., defraying the increased costs of regulating the importation into this state of intoxicating liquors," *id.* In the absence of any challenge to purpose, the Court apparently considered that it had no choice but to affirm and thus rendered the following limited holding: "*For this reason* [namely, "the unchallenged purpose"], we cannot say that the trial court erred in sustaining the constitutional validity of the tax under the Twenty-first Amendment rather than striking it down under the Commerce Clause." *Id.* At most, *Heublein* is precedent for the limited proposition that an appellate court "cannot say" that a trial court has "erred in sustaining the constitutional validity of the tax" when the "purpose" behind the enactment has gone "unchallenged." *Id.* At bottom, the holding in *Heublein* was a commentary on the taxpayer's litigation strategy – not on the merits of any underlying purpose challenge, which according to the Court, was never made.

41 * * *

the purpose and effect of the statute was economic protectionism"). The United States Supreme Court went further to hold that the purpose and the effect were economic protectionism even in the years immediately preceding the enactment of the 1985 Statute. *James B. Beam Distilling Co.*, 501 U.S. 529, 111 S. Ct. 2439 (1991). The decisions of this Court and the United States Supreme Court, rendered in 1989 and 1991 respectively and therefore after the 1987 decision in *Heublein*, operate as intervening decisions vitiating any stare decisis effect for *Heublein*.[42]

* * *[43]

The Superior Court erred in holding that the *Heublein* decision barred Plaintiffs' multiple Interstate Commerce Clause claims and their multiple Foreign Commerce Clause claims – claims that were neither presented nor decided in *Heublein*.

J. The Superior Court's remedial rulings should be vacated as premature.

This Court should vacate the Superior Court's remedial rulings as premature. Relying in part upon the *Age* case, the Superior Court held that Plaintiffs' 42 U.S.C. § 1983 claims are barred because "adequate procedural

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[42] *See generally Limbach*, 466 U.S. at 362, 104 S. Ct. at 1843; *Mason & D. Ls., Inc. v. Odom*, 193 Ga. 471, 476, 18 S.E.2d 841, 844 (1942); *Jacobs v. Metro C.-P., Inc.*, 125 Ga. App. 462, 465, 188 S.E.2d 250, 252 (1972); *Hambrick v. Nova*, 112 Ga. App. 258, 259, 144 S.E.2d 922, 923 (1965).

[43] * * *

remedies are provided by the state." RI289:15. That turns the *Age* decision on its head: The *Age* court expressly did not reach the Due Process adequacy of these remedies, 830 F. Supp. at 1495-96; held all of these remedies to be inadequate under a lesser standard, *id.* at 1492-95, 1496-99, with the exception of prospective injunctive and declaratory relief – the very relief the Superior Court failed to address. At the same time it was upholding their adequacy, the Superior Court denied these remedies to Plaintiffs because of a so-called "pass-on" to their wholesalers. RI289:14. In *McKesson*, because "the pass-on itself furthers the very competitive disadvantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place," the Court unanimously "reject[ed the] pass-on defense." 496 U.S. at 48-49, 110 S. Ct. at 2256 (footnote omitted).[44] Moreover, Plaintiffs were then liable for and paid for the tax stamps. *See Age*, 830 F. Supp. at 1490-91. Wholesalers, who were not the taxpayer at that time, certainly had no standing; "only the party who actually paid the taxes" has standing." *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga. App. 169, 198 S.E.2d 900, 902 (1973). Under this construction of

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[44] *See also Bacchus*, 468 U.S. at 267, 104 S. Ct. at 3053 (the taxpayers, there the "wholesalers[,] are, however, liable for the tax. Although they may pass it on to their customers, and they attempt to do so, they must return the tax whether or not their customers pay their bills. Furthermore, even if the tax is completely and successfully passed on, it increases the price of their products as compared to the exempted beverages . . . . The wholesalers plainly have standing").

these assertedly "adequate" remedies, no one has standing.[45]

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[45] There are still other inadequacies; for instance, the refund statute "is only applicable to a claim for an improper collection of tax under a valid tax law; it does not address the situation where the tax statute . . . is . . . unconstitutional." *Age*, 830 F. Supp. at 1491-90 (citing *Reich*, 262 Ga. 625 (vacated on other grounds)).

APPENDIX U

IN THE SUPREME COURT STATE OF GEORGIA

APPELLANTS' OPPOSITION TO MOTION TO DISMISS

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Plaintiffs/Appellants respectfully submit this Opposition to Defendants' motion to dismiss.

I. INTRODUCTION

Even after this Court's decision in *Heublein, Inc. v. State*, 256 Ga. 578, 351 S.E.2d 190, *appeal dismissed*, 483 U.S. 1013 (1987), the 1985 Statute[1] remained constitutionally suspect for a number of reasons. The decision in *Heublein* was a narrow one, rendered in a case presenting a limited challenge. Further, in 1989, this Court struck down the predecessor statute using as its basis the legislative history surrounding the enactment of the 1985 Statute. *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E.2d 95 (1989) (subsequent history omitted). Moreover, in 1989, the Florida Supreme Court struck down that state's double-taxing statute, which was specifically modeled on Georgia's statute. *Ivey v. Baccardi Imports Co.*, 541

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[1] The 1985 Statute was enacted by an Act entitled Alcoholic Beverages – Excise Taxes on Alcohol, Distilled Spirits, Table Wines, and Dessert Wines, No. 540 (House Bill No. 564), at Ga. L. 1985 at pp. 665-67 and codified at O.C.G.A. §§ 3-4-60 (spirits and alcohol, collectively "liquor") & 3-6-50 (wine).

So.2d 1129 (Fla. 1989). And the *Ivey* court did so notwithstanding the *Heublein* decision, precisely because of the limited nature of that decision and the unusual concession the taxpayer made in that case. As a consequence, in 1992 when the General Assembly repealed the general refund statute as to Plaintiffs, many of the Plaintiffs had already presented administrative claims to the Revenue Commissioner that were pending at the time of repeal.

Plaintiffs' new challenge to the 1985 Statute was much broader than the limited challenge made in *Heublein*. Plaintiffs launched some five distinct challenges under the Interstate Commerce Clause and the Due Process Clause as well as distinct challenges under the Foreign Commerce Clause. Plaintiffs also challenged the 1985 Statute under the Import Export Clause, the Equal Protection Clause as well as numerous provisions of the Georgia Constitution.

Since challenges to Georgia taxes seeking prospective declaratory and injunctive relief have frequently been rejected on the ground that the General Assembly has provided a statutory remedy in the refund statute at O.C.G.A. § 48-2-35, Plaintiffs made sure to comply with the requirements of this statute, including the requirement to file an advance administrative claim. There was no administrative bypass in this case; Plaintiffs fully complied with available administrative procedures.

Before going to court, the statute requires the taxpayer to wait a year after filing the administrative claim. *See* O.C.G.A. § 48-2-35(b)(4). If, within that one-year waiting period, the taxpayer's administrative "claim is not decided by the commissioner," the taxpayer then has "the

right to bring an action for a refund in the superior court." *Id.*

While Plaintiffs were still within this one-year waiting period in 1992, the General Assembly repealed the general refund statute as to Plaintiffs. To deal with the pending administrative claims, the General Assembly, in the uncodified session laws, simply cut out the traditional one-year waiting period and directed taxpayers with pending claims to go directly to Superior Court within 90 days on pain of losing their claims altogether:

> (d) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which an application for credit or claim for refund has been filed prior to the effective date of this Act, the law which was in effect at the time the application for credit or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payments, and provided, further, *that if a suit for refund or credit has not filed prior to the effective date of this Act with regard to any such application or claim, any suit for recovery of a credit pertaining to such a claim or application must be filed within 90 days after the effective date of this Act.*

See Ga. L. 1992, p. 1458, § 5(d), Exhibit B to Plaintiffs' Complaint (No. E 3793) (filed July 10, 1992), RI2:(R68).[2] The effective date of the 1992 Act was April 13, 1992. As noted, Plaintiffs had followed available administrative procedures and had filed administrative claims with the Revenue Department. These claims were still pending at

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the time the 1992 Act was enacted, and the Revenue Commissioner had taken no action on these claims. Faced with this specific provision in the 1992 Act, Plaintiffs went ahead and followed the directive of the General Assembly by filing their "suit" "within 90 days after the effective date." In fact, Plaintiffs filed two actions: 1) one in Federal court on July 9, 1992[3] and 2) the instant action in Fulton Superior (Civil Action No. E 3793) the next day on July 10, 1992.

The General Assembly replaced the general refund statute with a credit statute, later codified at O.C.G.A. §§ 3-2-13 & 3-2-14. The credit statute likewise provided for a minimum one-year waiting period and further provided that the taxpayer could bring an action in Superior Court if the taxpayer's administrative "claim is not decided by the commissioner" within that period. *See* O.C.G.A. § 3-2-14(b). The new credit statute also established several new requirements pertaining to a constitutional challenge:

> (b) The commissioner may issue credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue credits for stamps purchased by a manufacturer, distiller, or wholesaler when it is shown to the commissioner's satisfaction that any of the following events have occurred:
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> . . .

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[3] The Federal court action became known as *Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484, 1496 (N.D. Ga. 1993), *aff'd*, 37 F.3d 637 (11th Cir. 1994).

> (6) Taxes were paid or stamps were purchased under a statute expressly held to be unconstitutional by a court of last resort and the payments were made under protest and the ground of the protest was the same as the basis for the ruling of unconstitutionality by the court of last resort.

See Ga. L. 1992, § 1, Exhibit B to Plaintiffs' Complaint, RI2:(R61-62) (later codified at O.C.G.A. § 3-2-13(a)). The new credit statute required a "ruling of unconstitutionality by the court of last resort." *See* O.C.G.A. § 3-2-13(a)(6). The provision made clear that the Revenue Department was not competent to render the "ruling of unconstitutionality." Instead, it must come from "a court of last resort." This provision clearly contemplated a proceeding before "a court of last resort," presumably an appellate proceeding before this very Court.

For taxes paid after the effective date of the 1992 Act, Plaintiffs submitted administrative claims in compliance with the new statute. When their "claim[s were] not decided by the commissioner" within the waiting period, Plaintiffs invoked their statutory "right to bring an action" in Superior Court, *see* O.C.G.A. § 3-2-14(b), by bringing the second complaint below in Civil Action No. E 25073.

II. ARGUMENT AND CITATION OF AUTHORITY

A. For the discretionary appeal statute to apply, there must have been two adjudications by tribunals below; a decision by the administrative agency and a second decision by the Superior Court.

The discretionary appeal statute upon which Defendants rely, first enacted in 1979, provides in Subsection (a)(1) as follows:

> (a) Appeals in the following cases shall be taken as provided in this Code section:
>
> (1) Appeals from ***decisions** of the superior courts reviewing **decisions** of* the State Board of Workers' Compensation, the State Board of Education, auditors, *state* and local *administrative agencies,* and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations. . . .

O.C.G.A. § 5-6-35(a)(1).

Noting the statutory requirement of two "decisions" (one by the Superior Court and one by an administrative agency), this Court explained the intent of Subsection (a)(1) so:

> The clear intent of section (a)(1), above, was to give the appellate courts (particularly the Court of Appeals which has jurisdictions of workers' compensation cases not involving the constitutionality of a law) the discretion not to entertain an appeal where the superior court

> had reviewed a decision of certain specified lower tribunals (i.e., *two tribunals had already adjudicated the case*). . . . That act is to be interpreted reasonably to accomplish the General Assembly's intended purpose.

Citizens & Southern Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139, 142 (1980) (paragraph structure altered). By the same token, when "there has been *no* adjudication by two tribunals," the discretionary appeal statute does not apply, "and the case is directly appealable." *McCaughey v. Murphy*, 267 Ga. 64, 473 S.E.2d 762, 764 (1996) (emphasis original).

B. In this case, there was only one adjudication by only one tribunal below: The decision of the Superior Court of Fulton County.

In the present case, there was only one adjudication – one "decision" – by only one tribunal, the Superior Court of Fulton County. As a consequence, under the rule of this Court's *McCaughey* decision, "the case is directly appealable." 267 Ga. 64, 473 S.E.2d at 764. There was simply no "decision" by an administrative agency in this case. Certainly, the Superior Court (per the Honorable Alford J. Dempsey, Jr.) did not regard itself as "reviewing" (O.C.G.A. § 5-6-35(a)(1)) an administrative decision. Not only does it not review an administrative decision, the Superior Court does not even mention any such decision, and for good reason: There was no administrative decision. There is absolutely nothing in the record to indicate the existence of any such administrative decision. Nor have Defendants cited to any such administrative decision.

C. Indeed, the statutory right of action upon which Plaintiffs filed suit became applicable precisely because Plaintiffs' administrative claims were "not decided" by the Revenue Department, O.C.G.A. §§ 48-2-35(b)(4) & 3-2-14(b).

As Defendants note in their Motion to Dismiss, Plaintiffs brought these lawsuits, in part, pursuant to O.C.G.A. §§ 48-2-35 & 3-2-14 after having presented administrative claims to the Revenue Commissioner. *But Defendants omit to mention that the Commissioner never issued a ruling on these claims. See* Defendants' Motion to Dismiss (service dated May 30, 2000) at 1-2.

In fact, both statutes specifically contemplate and authorize the filing of a court action when, as here, the administrative "claim is *not decided* by the commissioner." *E.g.*, O.C.G.A. § 48-2-35(b)(4). More fully, Section 48-2-35 provides:

> (4) Any taxpayer whose claim for refund is denied by the commissioner or his delegate *or whose claim is not decided by the commissioner* or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer. . . .
>
> (5) No action or proceeding for the recovery of a refund under this Code section shall be commenced before the expiration of one year from the date of filing the claim for refund unless the commissioner or his delegate renders a decision on the claim within that time, nor shall any action or proceeding be commenced after the expiration of two years from the date

> the claim is denied. The two-year period prescribed in this period for filing an action for refund shall be extended for such period as may be agreed upon in writing between the taxpayer and the commissioner during the two-year period or any extension thereof.

O.C.G.A. §§ 48-2-35(b)(4) & (5).

Section 3-2-14 makes the same provision:

> Any applicant whose claim is denied by the commissioner or his delegate ***or whose claim is not decided by the commissioner*** or his delegate within one year from the date of filing the claim shall have the right to bring an action for a credit in the Superior Court of Fulton County. No action or proceeding for the recovery of a credit shall be commenced before the expiration of one year from the date of filing the application unless the commissioner or his delegate renders a decision on the application within that time, nor shall any action or proceeding be commenced after the occurrence of the earlier of (1) the expiration of one year from the date the claim is denied, or (2) the expiration of two years from the date the application was filed. The time for filing an action for the recovery of a credit may be extended for such period as may be agreed upon in writing between the applicant and the commissioner during the period authorized for bringing an action or any extension thereof.

O.C.G.A. § 3-2-14(b).

Under both statutes, a "right to bring an action" in Superior Court arises if the taxpayer has waited a full year and the taxpayer's "claim is not decided by the

commissioner." O.C.G.A. § 48-2-35(b)(4); *see also id.* § 3-2-14(b) ("claim is not decided by the commissioner"). Under both statutes, the General Assembly has directed that, after the waiting period has expired, the taxpayer's court action may proceed in the absence of an administrative decision by the Revenue Commissioner – in other words, even though the taxpayer's "claim is not decided by the commissioner." The United States District Court described this provision as a "one-year waiting period which must pass before the taxpayer can get into court, if the commissioner declines to rule on the application." *Age*, 830 F. Supp. at 1496. In this circumstance, "the commissioner declines to rule on the application." Both the refund statute and the credit statute specifically describe this right to bring a court action as arising when the commissioner has "not decided." O.C.G.A. §§ 48-2-35(b)(4) & 3-2-14(b). This is precisely the procedure Plaintiffs followed in this case. Plaintiffs did not bypass the administrative procedure. To the contrary, Plaintiffs made sure to comply with the procedure by presenting administrative claims to the Commissioner. Only once they had waited the requisite period – and in the absence of any decision by the Commissioner – did Plaintiffs file their actions in Superior Court, as the statutes permitted them to do. Again, there was no administrative bypass; Plaintiffs followed the terms of the statute precisely. As a result, the Superior Court's decision was the first and only decision in this matter. There "has been no adjudication by two tribunals," but rather an adjudication by the Superior Court only. Accordingly, "the case is directly appealable." *McCaughey*, 267 Ga. 64, 473 S.E.2d at 764 (emphasis omitted).

D. The statutes are mutually exclusive: Whereas the discretionary appeal statute requires a "decision" by the administrative agency to become operative, O.C.G.A. § 5-6-35(a)(1), the refund and credit statutes become operative when the administrative "claim is not decided," O.C.G.A. §§ 48-2-35(b)(4) & 3-2-14(b).

When, as here, the General Assembly has so clearly provided for a court action in, and a single decision in the first instance by, the Superior Court, the discretionary appeal statute can have no application.[4] Indeed, these statutes are mutually exclusive. Where the discretionary appeal statute requires a "*decision*[by an] administrative agenc[y]" to become operative, O.C.G.A. § 5-6-35(a)(1), the right of action provided by the refund and credit statutes becomes operative when the administrative "claim is *not decided*," O.C.G.A. §§ 48-2-35(b)(4) & 3-2-14(b). Decision vs. No Decision. Decided vs. Not Decided. The statutes are mutually exclusive, and the discretionary appeal statute does not apply.

E. It was previously adjudicated in the *Age* case, and Defendants admitted in judicio, that the Revenue Department "took no action" on Plaintiffs' administrative applications.

Defendants' record cites show that Plaintiffs did file administrative claims, but they provide no support for Defendants' statement that "the Revenue Department

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[4] As explained below, the General Assembly gave two further and even more explicit directives in this case.

refused to grant the claims for refund" (Motion to Dismiss at 1-2), unless that statement is just another way of saying that the Commissioner took no action. In fact, the issue whether the Commissioner took action was previously adjudicated in the *Age* case – with specific findings and, indeed, judicial admissions by Defendants that "the Department took no action on the applications." *See Age*, 830 F. Supp. at 1496-97. In her decision, the Honorable Orinda D. Evans wrote:

> The evidence presented at the hearing does show that the Revenue Department has dragged its feet in processing Plaintiffs' claims. Probably the best evidence of this is Defendants' Exhibit 3, a collection of correspondence between Plaintiffs' counsel and Herman Oliver, Tax Conferee for the Alcohol and Tobacco Tax Unit. In those letters, Mr. Oliver repeatedly asks for more information about the basis for the claims, despite repeated offers by Plaintiffs' counsel to provide records, other documents, written explanations, or oral explanations. *Mr. Oliver also stated that the Department* ***took no action*** *on the applications because he had learned that Plaintiffs had filed declaratory judgment actions in state and federal court,* despite no indications from Plaintiffs that they did not want their claims to be processed administratively.[11]
>
> 11. It also appears that the Alcohol and Tobacco Tax Unit has not yet ruled on applications submitted by Plaintiff in *1985.*

Age, 830 F. Supp. at 1497 & n.11 (emphasis in part original). The reference to an action filed in "state . . . court" was a reference to the instant case, which had already

been filed at the time of Judge Evans's 1993 opinion. *See id.* at 1490.[5]

There was a clear statement, and judicial admission, that the Revenue Department had taken "no action" on the administrative applications in this very case prior to the filing of the case (and, indeed, had still taken no action after the filing of the instant lawsuit up until the time of the evidentiary hearing before Judge Evans). Under these circumstances, Defendants are precluded from arguing – if that is what they are now trying to do – that the Revenue Department decided Plaintiffs' administrative claims in this case.

F. The case law is in accord: The absence of an administrative response to a claim does not constitute a "decision" under the discretionary appeal statute.

Whether

1) because of the total absence of any record support for an administrative "decision" in this case or

2) because of the statutory right of action upon which Plaintiffs sued, which became operative (just as the General Assembly crafted it) precisely because there was no such decision or

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[5] The reference, in Judge Evans's footnote 11, to administrative applications submitted in 1985 was a reference to administrative claims filed in the *Beam* case. *See Age*, 830 F. Supp. at 1488.

3) because of application of the doctrines of collateral estoppel, res judicata, and admissions in judicio,

the conclusion must be the same: There was no administrative "decision" on Plaintiffs' claims. This accords with the decision in *McBride v. Zant*, 204 Ga. App. 183, 418 S.E.2d 781 (1992).

In *McBride*, the plaintiff had "presented the facts relating to each complaint in each institution's prisoner grievance procedure." A threshold question was whether the discretionary appeal statute applied. The *McBride* court concluded: "The answer is no"; the plaintiff "did not receive a response from the warden" in the grievance procedure. 418 S.E.2d at 782. Silence from the administrative agency – no response, no action or (even as Defendants now characterize it in their Motion to Dismiss) a refusal to respond – simply does not qualify as a "decision" under the discretionary appeal statute.

G. This Court's decisions show that even administrative action far more affirmative than the silence in this case will not qualify as a "decision" under the discretionary appeal statute.

Indeed, this Court's decisions show that even administrative action far more affirmative than the silence in this case will not qualify as a "decision" for purposes of the discretionary appeal statute. In *McCaughey*, the auditor had submitted to the Superior Court an extensive report containing "a detailed factual analysis," with "conclusory statements" as to liability. 473 S.E.2d at 764. The

Court noted that, even if these statements could be construed as proper "conclusions of law, those conclusions are commingled with findings of fact." As such, no matter how extensive, the report was considered to be something less than "a final report." *Id.* The auditor's report – far more extensive and far more affirmative than the "no action" in the present case – did not qualify as a "decision" or as an "adjudication" because it was not final.

The case of *Ford Motor Co. v. Collins*, 257 Ga. 310, 357 S.E.2d 567 (1987), is also instructive, especially as it involved the Revenue Department. Ford had requested that the Department license Ford as a gasoline distributor. In the *Ford Motor* case, unlike the instant case, the Revenue Department expressly "denied Ford's request and advised Ford by letter that the Department did not consider Ford to be a gasoline distributor." 357 S.E.2d at 568. Before this Court, the Department argued that the express denial by letter should bring the discretionary appeal statute into play. *Id.* The Court rejected the Department's argument and denied the motion to dismiss, stating:

> We decline to hold that letter from an official within the office of the Commissioner of the Department of Revenue is an agency "decision" within the meaning of the statute.

Id. In the present case by contrast, there was not even so much as an express denial by letter from the Revenue Department. As Defendants admitted before the United States District Court, they took "no action" on Plaintiffs' administrative claims.

H. Two additional legislative directives, specifically with reference to this case, demonstrate that an administrative decision was neither contemplated nor required by the General Assembly.

As noted, two additional directives from the General Assembly, specifically with reference to this case, demonstrate that an administrative decision was neither contemplated nor required.

1. In 1992, the General Assembly cut out the traditional one-year waiting period and commanded Plaintiffs to go directly to court within 90 days on pain of losing their claims altogether.

In 1992, the General Assembly repealed the general refund statute as it applied to Plaintiffs and replaced it with the credit statute in Section 3-2-14. In the uncodified session laws pertaining to this repeal, the General Assembly cut out the traditional one-year waiting period contained in Section 48-2-35 and directed administrative claimants to go directly to court within 90 days on pain of losing their claims:

> (d) With regard to taxes paid and stamps purchased prior to the effective date of this Act and with regard to which an application for credit or claim for refund has been filed prior to the effective date of this Act, the law which was in effect at the time the application for credit or claim for refund was filed shall apply, provided that no interest shall be allowed on any such payments, and provided, further, *that if a suit for refund or credit has not filed prior to the effective*

> *date of this Act with regard to any such application or claim, **any suit for recovery of a credit pertaining to such a claim or application must be filed within 90 days after the effective date of this Act.***

See Ga. L. 1992, pp. 1464-65, § 5(d), Exhibit B to Plaintiffs' Complaint (No. E 3793) (filed July 10, 1992), RI2:(R68). The effective date of the 1992 Act was April 13, 1992.

As they were directed to do by the General Assembly, Plaintiffs filed their "suit," "within 90 days after the effective date," on July 10, 1992 – the 88th day after the effective date. With the establishment of this tight deadline and the express command to file "suit" on pain of losing the claim altogether, the General Assembly clearly had no expectation that the Commissioner would be deciding the claims before suit was filed. In any event, since Plaintiffs waited, until two days short of the expiration of the 90-day period, to file their suit, the Commissioner did in fact have an additional 88 days in which to decide the claims. But the Commissioner chose to take "no action," just as he had taken no action on the *Beam* administrative claims filed as long ago as 1985. *See Age*, 830 F. Supp. at 1497 & n.11.

2. In the new credit statute, the General Assembly provided for and required a proceeding before "a court of last resort," presumably an appellate proceeding before this very Court, to secure a "ruling of unconstitutionality" – a ruling the Revenue Commissioner was made incompetent to render.

In the replacement credit statute, the General Assembly established several new requirements pertaining to Plaintiffs' constitutional challenge to the 1985 Statute:

> (b) The commissioner may issue credits for taxes paid by or due from a wholesaler or, in the case of taxes on distilled spirits, may issue credits for stamps purchased by a manufacturer, distiller, or wholesaler when it is shown to the commissioner's satisfaction that any of the following events have occurred:
>
> . . .
>
> (6) Taxes were paid or stamps were purchased under a statute expressly held to be unconstitutional by a court of last resort and the payments were made under protest and the ground of the protest was the same as the basis for the ruling of unconstitutionality by the court of last resort.

See Ga. L. 1992, pp. 1458-60, § 1, Exhibit B to Plaintiffs' Complaint, RI2:(R61-62) (later codified at O.C.G.A. § 3-2-13(a)). The new credit statute requires that the tax "statute [be] expressly held to be unconstitutional by a court of last resort." Clearly, the General Assembly contemplated and required that "a court of last resort," perhaps intended to signify this Court, must render "the

ruling of unconstitutionality." Under the new statutory scheme, the Commissioner is not competent to make this decision.

When, as here, the General Assembly has so clearly provided for and required a proceeding before "a court of last resort," presumably an appellate proceeding before this very Court, there is no occasion for a purely discretionary appeal under O.C.G.A. § 5-6-35(a)(1) – not to mention the total absence of an administrative "decision" by the Commissioner on subject matter he is not competent to decide. For these reasons as well, the discretionary appeal statute does not apply.

I. Under the practice and precedent established both by Defendants and by this Court in the *Beam* case, the discretionary appeal statute does not apply.

None of the cases cited by Defendants in their Motion to Dismiss concerns or addresses the situation in this case, where the Commissioner takes no action and makes no decision on the administrative claim and where the General Assembly has specifically authorized the claimant under that circumstance and after waiting the requisite period, to file a court action. But this situation has in fact come before the Georgia courts in at least one other case, a case not cited by Defendants: the *Beam* case. In the discovery phase of the *Beam* challenge to the Pre-1985 Statute, Defendants produced documents concerning the legislative history of the 1985 Statute that had not been produced or considered by the courts in the *Heublein* challenge. Relying upon the newly disclosed

evidence concerning the enactment of the import-approach 1985 Statute, Judge Hicks of Fulton Superior Court found and held that even the purpose and effect of the Pre-1985 Statute were economic protectionism:

> This Court further holds that the purpose of O.C.G.A. § 3-4-60, as it existed during the years in question, was economic protectionism, i.e., to benefit local business and local industry. This purpose is indicated by the legislative history. . . . The protectionist purpose of the statute is further indicated by the exhibits "A-3" through "A-13" produced by the plaintiff in opposition to the defendants' Motion for Summary Judgment and produced to plaintiffs by the defendants pursuant to this Court's Order of December 3, 1987[ ].

RI113&116:94-98.

In that case, as in this case, before filing in Superior Court, Beam had filed an administrative claim with the Revenue Commissioner. RI23:(R463-73); *see also* Appendix A hereto. In that case, as in this case, the Commissioner took no action on Beam's administrative claim. *See Age*, 830 F. Supp. at 1488 & n.4, 1497 & n.11 ("Beam had filed a request for a refund on April 25, 1985, with the Georgia Department of Revenue, and the Commissioner had not ruled on the application within a year of the filing"; "In fact, it appears that the Commissioner had not ruled on the claim as of the date the complaint was filed, nearly *two years* after the initial claim was filed" (emphasis original)).

Even though an administrative claim had been filed with the Commissioner in advance of Judge Hicks's decision in *Beam, both sides filed direct appeals* from the

Superior Court decision, not discretionary appeal applications. *See* Appendix A. Beam appealed from Judge Hicks's prospectivity ruling while Defendants appealed from the ruling of unconstitutionality. Beam initially filed its direct appeal with the Court of Appeals. Defendants filed a direct appeal in which they "point[ed] out that the Plaintiff's appeal and the Defendants' cross appeal should be transferred to the Supreme Court of Georgia which has jurisdiction of this case on appeal for the reason that the case involves the constitutionality of a Georgia law and the revenues of this State." Defendants' *Beam* Notice of Cross Appeal (dated June 27, 1988) at 1-2, contained in Appendix A. As Defendants' point was clearly correct, Beam filed an Amended Notice of Appeal by Consent reciting that, "since the case involves the constitutionality of a Georgia statute, all parties agree that under the authority of Article 6, Section 6, ¶ 2 of the Constitution of the State of Georgia, the Supreme Court of Georgia has jurisdiction over this appeal rather than the Court of Appeals. Therefore, *all parties consent* to have the case transferred to the Supreme Court of Georgia." *Beam* Amended Notice of Appeal by Consent (filed July 14, 1988) at 1-2, contained in Appendix A.

Neither side, including these self-same Defendants, considered it appropriate to make an application for a discretionary appeal merely because an administrative claim had been filed with the Commissioner upon which he had taken no action. Further, in that case, as in this case, because there was no decision by the Commissioner, Judge Hicks's decision did not review and did not even mention any (nonexistent) Commissioner decision. There was in *Beam*, as in this case, only one decision by a lower

tribunal – namely, the decision of the Superior Court. Further, all parties, including these same Defendants, took the position that appeal lay to the exclusive jurisdiction of this Court because of the questions of constitutionality. This is the same jurisdiction to which Plaintiffs appeal in the present case. *See* Brief of Plaintiffs/Appellants (filed June 2, 2000) at 1. Finally, neither the Court of Appeals nor this Court deemed the discretionary appeal statute applicable in *Beam*.

This Court's opinion in *Beam* recites the fact that the State filed an appeal from the trial court's decision of unconstitutionality, then immediately proceeds to decide that appeal (*without requiring an application for discretionary appeal*), and affirms the ruling of unconstitutionality:

> The State appeals the trial court's decision that the pre-1985 version of OCGA § 3-4-60 was unconstitutional. We find no error. The statute imposed higher taxes on out-of-state products solely because of their origin. The record demonstrates that the purpose and effect of the statute was simple economic protectionism, which is virtually per se invalid under the Commerce Clause of the U.S. Constitution.

James B. Beam Distilling Co. v. State, 259 Ga. 363, 382 S.E.2d 95, 96 (1989) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984)) (subsequent history omitted).

J. Should this Court now rule, for the first time, that the discretionary appeal statute applies, the ruling should be made prospective only.

Should this Court now decide, for the first time, that the discretionary appeal statute applies under the circumstances presented by this case, the ruling should be applied prospectively only, for numerous reasons. Such a ruling would not have been foreseeable in light of the mutually exclusive statutory provisions at issue. On one hand, the discretionary appeal statute requires a "decision" by the administrative agency to become applicable. *See* O.C.G.A. § 5-6-35(a)(1). On the other hand, the right of action invoked by Plaintiffs' "suits," as expressly formulated by the General Assembly, first becomes applicable when the administrative "claim is not decided by the commissioner." *See* O.C.G.A. § § 48-2-35(b)(4) & 3-2-14(b). Moreover, such a ruling would not have been foreseeable under the rule of this Court's *McCaughey* decision and like decisions requiring an adjudication "by two tribunals," and not just by the Superior Court alone. *McCaughey*, 267 Ga. 64, 473 S.E.2d at 764. Further, such a ruling would not have been foreseeable under the *McBride* case where it was held that no administrative response does not qualify as an administrative "decision" under the discretionary appeal statute. *McBride*, 204 Ga. App. 183, 418 S.E.2d at 782. Perhaps most important, such a ruling would not have been foreseeable under the practice and precedent established both by Defendants and by this Court in the *Beam* case. *James B. Beam Distilling*, 259 Ga. 363, 332 S.E.2d at 96.

Additionally, this case presents an issue of first impression given the two legislative directives applicable

to this case: 1) the very specific command by the General Assembly in the uncodified session laws at Ga. L. 1992, pp. 1464-65, § 5(d), directing Plaintiffs to proceed immediately to Superior Court and 2) the newly enacted statute requiring a "ruling of unconstitutionality," not by the Commissioner, but by "a court of last resort," O.C.G.A. § 3-2-13(a)(6). These legislative provisions have (apart from the *Age* case) never before been adjudicated. Under these circumstances, this Court should "pretermit the procedural issue and decide the appeal on its merits in accordance with the legislative intent expressed in Code Ann. § 6-905 (Ga. L. 1965, pp. 18, 40), because an important first-impression issue has been raised under this recently enacted and previously unconstrued public revenue statute, and because the trial court dealt with this issue on the merits, which was arguably authorized under the retention-of-jurisdiction provisions of Code Ann. § 91A-1449.1(h)." *See In Re Board of Twiggs County Commissioners*, 249 Ga. 642, 292 S.E.2d 673, 674 (1982). Should it choose not to pretermit, the Court should follow *Trend Development Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989), and apply any such ruling concerning the applicability of the discretionary appeal statute prospectively only. *See* 259 Ga. 425, 383 S.E.2d at 123-24 (applying ruling on applicability of discretionary appeal statute "henceforth" only and "hereafter" only and proceeding to the merits of the direct appeal in the case before the Court).